

v. 2923 No. 14629

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,
vs.

CLARA STINTZI, Guardian Ad Litem for Gerald
Stintzi, a minor, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 464, inclusive.)

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

MAR 21 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Eastern
District of Washington, Northern Division

No. 1052

CLARA STINTZI, Guardian Ad Litem for GER-
ALD STINTZI, a minor, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Defendant.

PETITION FOR REMOVAL

To the United States District Court for the Eastern
District of Washington, Northern Division:

Comes now the Defendant in the above entitled action and files this, its petition for removal of this cause from the Superior Court of the State of Washington, Spokane County, in which it is now pending, to the District Court of the United States, in and for the Northern Division of the Eastern District of Washington, held in the City of Spokane, in said District and State, and shows to the Court the following facts:

I.

That this cause was commenced in the Superior Court of Spokane County, State of Washington, and that a Summons and Complaint were served upon the Defendant and Petitioner herein on July 30, 1952, which Complaint set forth the claim for relief upon which the action is based; that the

Plaintiff and Defendant, through their respective counsel, have stipulated that the Defendant may have up to and including the 30th day of August, 1952, within which to appear in said action in the Superior Court of the State of Washington, in and for Spokane County, and/or to remove said action to the District Court of the United States for the Eastern District of Washington, Northern Division, as per copy of the attached stipulation, attached hereto and made a part hereof. [1*]

II.

That the action is one of a civil nature over which the District Courts of the United States have original jurisdiction, the said action having been brought by the Plaintiff against the Defendant for damages alleged to have been sustained by the Plaintiff as a result of being hurt in an accident when he was injured by a movement of some of Defendant's equipment.

III.

That the matter in dispute exceeds the sum of \$3,000.00, exclusive of interest and costs, the suit being for the sum of \$160,000.00, as will more fully appear by Plaintiff's Complaint, a copy of which is hereto attached and which is here referred to and made a part hereof.

IV.

That at the time of the commencement of this

* Page numbers appearing at foot of page of original Transcript of Record.

action and since that time the Plaintiff was and is now a citizen and resident of the State of Washington and of the County of Spokane in said State of Washington, and the Defendant, Northern Pacific Railway Company, a corporation, was and still is a corporation, incorporated and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen and resident of said State of Wisconsin, and is not now and was not at the time of the institution of the action, nor at any time, a citizen and resident of the State of Washington.

V.

That the Defendant files herewith a bond with a good and sufficient surety for paying all costs and disbursements incurred by reason of these removal proceedings, if this Court should hold that the action was not removable or improperly removed thereto, as provided by the statutes of the United States. [2]

Wherefore, your Petitioner prays for removal of the above entitled cause from the said State Court to this Court.

Dated at Spokane, Washington, this 29th day of August, 1952.

CANNON, McKEVITT & FRASER,

/s/ By FRANK J. McKEVITT,

Attorneys for Petitioner

CASHATT & TURNER,

/s/ By LEO N. CASHATT,

Attorneys for Petitioner

Duly Verified. [3]

In the Superior Court of the State of Washington
in and for the County of Spokane

No. 134044

Clara Stintzi, Guardian ad Litem for Gerald Stintzi,
a minor, Plaintiff, vs. Northern Pacific Rail-
way Company, a corporation, Defendant.

STIPULATION

It Is Hereby Stipulated by and between the above entitled parties, through their respective attorneys, that the defendant in this action may have to and including the 30th day of August, 1952, within which to appear in said action in the Superior Court of the State of Washington, in and for Spokane County, and/or to remove said action to the District Court of the United States for the Eastern District of Washington, Northern Division.

Dated at Spokane, Washington, this 18th day of August, 1952.

KEITH, WINSTON, MacGILLIVRAY
& REPSOLD,

JOHN T. DAY,

Attorneys for Plaintiff

[4]

COMPLAINT

Plaintiff complains:

I.

Clara Stintzi is the mother and duly appointed, qualified and acting guardian ad litem of Gerald Stintzi, a minor of the age of 17 years.

II.

The Northern Pacific Railway Company is a corporation engaged as a common rail carrier of freight and passenger traffic, conducts such business in Spokane County, Washington, and maintains and operates its railway yard and yard office at Yardley, Spokane County, Washington.

III.

Addison Miller Company is a corporation engaged in business as a fail supplier, and under contract with the defendant, Northern Pacific Railway Company, performs car icing operations for said railway at its yard at Yardley, Washington. At all times herein mentioned, the minor, Gerald Stintzi, was employed by the Addison Miller Company as a laborer and was engaged in such car icing operations.

IV.

During the evening of July 17, 1952, the minor, Gerald Stintzi, was engaged in the performance of duties for his employer, Addison Miller Company, and with other employees of such company was icing cars of the defendant, Northern Pacific Railway Company, which cars had been spotted by the defendant for such purpose alongside the defendant's [6] icing dock at Yardley, Washington. At the same time other railway cars and engines of the defendant railway company were engaged in switching operations at the defendant's yard under the control of employees of the defendant who knew or should have known that the cars immediately adjacent to the loading dock were being iced and that

employees of Addison Miller Company would be engaged in icing operations around and about the defendant's cars which had been spotted beside the icing dock. On July 17, 1952, at approximately 8:20 p.m., the minor, Gerald Stintzi, while engaged in such icing operations, was standing immediately alongside and partially between car No. 77346 and car No. 56160 owned by the defendant, which cars in a line of similar cars had been placed by the defendant alongside the icing dock for the purpose of being iced. As the minor plaintiff was standing in such position, the defendant, through its employees then engaged in switching operation, negligently and without warning of intention so to do disengaged a number of freight cars which were being switched, allowing the same to drift down the track and to come into violent contact with the stationary cars beside the icing dock which were in the process of being iced. As a result, the minor plaintiff was caught partially between cars No. 77346 and 56160 and was dragged along defendant's track for a distance of 42 yards, sustaining serious and permanent injuries to his person.

V.

As a proximate result of defendant's negligence, the minor plaintiff sustained a crushing and mangling of his right leg requiring amputation of the same at the hip, a fracture of the left leg, a fracture of the right arm, a severe laceration of the scrotum, a rupture of the urethra, various bruises, abrasions and contusions about the head and body, and a severe shock to his nervous system. At the

time of said injuries the minor plaintiff was of the age of 17 years, in good health and physical condition. Said injuries are permanent, and as a result the minor plaintiff will be totally disabled and incapable of engaging in any gainful occupation for the [7] balance of his natural life. By reason of such injuries and the pain and suffering occasioned and to be endured in the future thereby and by reason of the minor plaintiff's future inability to engage in any gainful occupation, plaintiff has been damaged in the sum of \$150,000.00.

VI.

Since the date of such injury, the minor plaintiff has been under medical care and attention at the Sacred Heart Hospital, where he will be required to remain for an indefinite period in the future. Although plaintiff does not now know the exact extent and cost of future medical and hospital care and attention which will be required by said minor, she is informed and alleges that such will approximate \$10,000.00, all to plaintiff's further damage in that amount.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$160,000.00, together with her costs and disbursements herein.

KEITH, WINSTON, MacGILLIVRAY
& REPSOLD,
JOHN T. DAY,
Attorneys for Plaintiff

Duly Verified. [8]

[Endorsed]: Filed August 29, 1952.

[Title of District Court and Cause.]

BOND FOR REMOVAL

Know All Men by These Presents: That we, Northern Pacific Railway Company, a corporation, as Principal, and The Fidelity and Casualty Company of New York, a corporation of the State of New York, as Surety, are held and firmly bound unto Clara Stintzi, Guardian Ad Litem for Gerald Stintzi, a Minor, Plaintiff in the above entitled action, in the penal sum of One Thousand and no/100ths Dollars (\$1,000.00), lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our respective successors and assigns, jointly and severally, firmly by these presents.

Upon Condition, Nevertheless, That

Whereas, the said Northern Pacific Railway Company, Defendant herein, has petitioned the District Court of the United States for the Eastern District of Washington, Northern Division, for the removal of the above entitled cause from the Superior Court of the State of Washington in and for Spokane County, to the United States District Court for the Eastern District of Washington, Northern Division.

Now, if the said Northern Pacific Railway Company shall well and truly pay all costs and disbursements that may be awarded by said United States District Court, if said Court shall hold that this suit is wrongfully or improperly removed thereto,

then this obligation to be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY
COMPANY,

/s/ By F. J. McKEVITT,
Division Counsel

[Seal] THE FIDELITY AND CASUALTY
OF NEW YORK,

/s/ By J. E. McGOVERN, Attorney [9]

[Endorsed]: Filed D. C. August 29, 1952.

[Title of District Court and Cause.]

NOTICE OF FILING PETITION AND BOND
FOR REMOVAL

To Clara Stintzi, Guardian ad Litem for Gerald Stintzi, a minor, and to Keith, Winston, MacGillivray & Repsold and John T. Day, your attorneys:

You are hereby notified that on the 29 day of August, 1952, a Petition and Bond for removal of the above entitled cause, copies of which are hereto attached, were filed in the United States District Court for the Eastern District of Washington, Northern Division, at Spokane, Washington.

Dated at Spokane, Washington, this 29 day of August, 1952.

CASHATT & TURNER,

/s/ By LEO N. CASHATT,
Attorneys for Defendant

CANNON, McKEVITT & FRASER,
/s/ By FRANK J. McKEVITT,
Attorneys for Defendant

Acknowledgment of Service attached. [10]

[Endorsed]: Filed D. C. August 30, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff for her Amended Complaint in the above-entitled action alleges:

I.

That plaintiff, Clara Stintzi, is the mother and the legally and duly appointed, qualified and acting Guardian ad Litem of Gerald Stintzi, a minor of the age of 18 years, and who was of the age of 17 years at the time of the accident hereinafter described.

II.

That defendant, Northern Pacific Railway Company, now is and at all times herein mentioned has been a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and as such operates lines of railroad in the State of Minnesota and other states and in the State of Washington, and in Spokane County, and is a common rail carrier, hauling freight and passengers on its lines as a common carrier for hire, and said defendant maintains and operates a railroad yard

and yard shops at Yardley, near the City of Spokane, in Spokane County, Washington. [16]

III.

The Addison Miller Company is a corporation engaged in business in Spokane County and at or near Yardley, Washington, and under and by virtue of a contract with the defendant, Northern Pacific Railway Company, Addison Miller Company performs car icing operations for the said defendant railroad at its said yard at Yardley, Washington; and at all times herein mentioned the minor, Gerald Stintzi, was employed by the Addison Miller Company as a laborer, and was at the time of the accident herein alleged, engaged in car icing operations under the direction of the Addison Miller Company.

IV.

That on or about the evening of July 17th, 1952, and for many years previous thereto, the defendant had maintained certain railroad yards, including various repair tracks, inspection tracks and the usual trackage which is common in railroad yards generally; that on or about the evening of July 17th, 1952, the said minor, Gerald Stintzi, was engaged in the performance of duties for his employer, the Addison Miller Company, and he was working within the scope and course of his employment and within the line of his duty along with other employees of said company in icing cars for defendant, Northern Pacific Railway Company, which cars had been spotted by the defendant for

such purposes alongside the defendant's icing dock at Yardley, Washington; that at said time it was the duty of the said minor, Gerald Stintzi, to work and be on, around and about the said railroad cars and trains of the defendant; and at said time other railroad cars and engines of the defendant railroad company were engaged in switching operations at and throughout the defendant's yard and under the control of the defendant and its employees and agents, who knew or should have known that the cars which were immediately adjacent to its loading dock were being iced and that employees of Addison Miller Company would be engaged in said icing operations in, around and about said defendant's cars [17] which had been spotted beside said icing dock.

V.

That on July 17th, 1952, at approximately 8:20 p.m., the minor, Gerald Stintzi, while engaged in such icing operations and within the scope of his employment, was required to stand and was standing immediately alongside and partially between car Nos. 77346 and car No. 56160 of the defendant railway company, which two cars had been placed in a line of cars by the defendant alongside of the icing dock; at such time and as the minor was standing in the position heretofore described, the defendant and its agents and employees were then engaged in switching operations and negligently and carelessly and without warning of any intention so to do, disengaged and uncoupled a number of freight cars which were being switched, allowing the same

to drift and proceed down said track and to come into sudden and violent contact with the stationary cars spotted beside said loading docks; that as a result the stationary cars were caused to be set in motion and they moved onto and against cars No. 77346 and No. 56160 where the said Gerald Stintzi was working, causing said cars to be suddenly and violently moved and causing the said Gerald Stintzi to be thrown under the moving wheels thereof, dragging him along said track for a considerable distance and inflicting upon him the severe and permanent injuries hereinafter set forth.

VI.

That said minor's injuries and damages were directly and proximately caused by the negligence of the defendant, its agents, employees and servants, in one or more of the following respects:

1. That the defendant, its agents and servants negligently failed to keep a proper lookout and to use proper care for the safety of said Gerald Stintzi while he was in the performance of his duty; [18]

2. That the defendant, its agents and servants negligently failed to give to said Gerald Stintzi, any notice or warning that any railway cars were to be moved and shoved onto and against the railway cars about which the said Gerald Stintzi was working;

3. That the defendant, its agents and servants negligently moved and switched railway cars onto, over and against the said line of cars about which said Gerald Stintzi was working;

4. That the defendant, its agents and servants

in charge of its switching operations, negligently moved, operated and controlled said switching operations and the cars involved therein;

5. That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being switched against those being iced and on which the said Gerald Stintzi was working, negligently moved said engine and said train and said cars involved at an excessive and dangerous rate of speed under the circumstances obtaining;

6. That at all times herein mentioned, the defendant, its agents, servants and employees, had full knowledge and notice, or in the exercise of ordinary care should have had full notice and knowledge, that the said Gerald Stintzi and/or other employees of defendant or other persons employed by other parties and by Addison Miller Company would be working on or about said railway cars spotted beside the defendant's loading dock, but that notwithstanding its said knowledge and notice, the defendant, its agents, employees and servants negligently caused the said cars to be switched, moved or pushed onto and against the said stationary cars spotted and standing on the track adjacent to the defendant's loading dock and where said Addison Miller Company was carrying on its icing operations, without notice or warning of any kind;

7. That the defendant, its agents, employees and servants in charge of said train and cars which were switched negligently, moved the same without keeping the same under reasonable and proper control at all times.

VII.

That by reason of defendant's negligence in one or more of the particulars above charged, and as a proximate result of said defendant's negligence as aforesaid, the said Gerald Stintzi was severely injured in and about his entire body; that the right leg of said Gerald Stintzi was crushed and mangled and traumatically amputated near the hip joint; that the skin of the right lower abdomen and buttocks was torn away from the underlying tissues [19] and extensive lacerating wounds were suffered by said Gerald Stintzi which wounds extended into the rectum; and there was a complete avulsion of the right scrotum and a rupture of the urethra; that the left femur was fractured in a comminuted manner at the junction of its middle and upper third, and the said Gerald Stintzi also suffered multiple contusions about the knee and hip joint on the left hand side and said Gerald Stintzi also sustained comminuted fractures of both bones of the right forearm at about the mid point of the lower arm; that said injuries are permanent and as a result thereof the said minor, Gerald Stintzi, will be totally disabled and incapable of engaging in gainful occupation for the balance of his life.

VIII.

That the said Gerald Stintzi sustained a severe shock unto his entire nervous system and his general health and wellbeing has been greatly injured and impaired and all of said injuries have caused the said Gerald Stintzi great pain and suffering, al-

though while at the time of said injuries said minor Gerald Stintzi was of the age of 17 years and in good health and physical condition; that said minor sustained great and extreme pain and suffering; that the treatment of said Gerald Stintzi required numerous transfusions, a guillotine re-amputation of the right femur approximately three inches below the hip joint, with removal of devitalized skin and said Gerald Stintzi likewise sustained extreme suffering by the replacement of the right testicle in the scrotum and throughout the whole treatment and repair of the said Gerald Stintzi; that the said Gerald Stintzi was required to submit to surgery numerous times, at which times treatment was accorded to the said Gerald Stintzi and surgical procedures were engaged in, and there were skin grafts performed which caused great and additional pain and suffering. That surgery was performed on the right forearm of the said Gerald Stintzi and he remained under treatment at a hospital [20] for a period of time in excess of nine months; and said Gerald Stintzi, as a result of his injuries, has been unable to use an artificial limb and he will always suffer from disfigurement, humiliation and embarrassment resulting from his said injuries, and said Gerald Stintzi will require a considerable amount of constant care for many years.

IX.

That the said Gerald Stintzi, as a result of the injuries sustained, has incurred hospital expenses in the present amount of \$6,683.05, doctors' bills in

the present amount of over \$3,000.00, expense for prosthetic devices in the amount of \$662.81, expense for car and transportation in a sum in excess of \$500.00, and other incidental items of expense, the full amounts of which are not known; that likewise, by reason of the injuries and suffering occasioned and to be endured in the future, and by reason of the minor plaintiff's future inability to engage in gainful occupation, and by reason of the necessity for future personal care, and by reason of all of the injuries sustained, and the humiliation and mortification heretofore alleged, the said minor plaintiff, Gerald Stintzi, has been damaged in the sum of \$250,000.00.

Wherefore, plaintiff prays for judgment against the defendant as follows:

1. For the sum of \$260,845.86;
2. For costs and disbursements; and
3. For such other special damages by way of hospital, medical care and personal care, and other expenses which may be incurred and [21] ascertainable at the time of trial.

/s/ R. MAX ETTER,

/s/ JOHN D. MacGILLIVRAY,

/s/ JOHN T. DAY,

Attorneys for Plaintiff.

Jury trial of the above issues is hereby demanded.

/s/ R. MAX ETTER,

of Counsel for Plaintiff. [22]

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, and for answer to plaintiff's Amended Complaint, admits, denies and alleges as follows:

I.

Answering Paragraph I, defendant admits that Clara Stintzi is the Mother and duly appointed, qualified and acting Guardian ad Litem of Gerald Stintzi. As to the age of the minor therein referred to, defendant has no knowledge or information sufficient to form a belief thereof, and therefore denies the same.

II.

Defendant admits Paragraph II.

III.

Answering Paragraph III, defendant admits each and every matter therein contained, except that defendant specifically denies that at the time of the accident, Gerald Stintzi was engaged in car icing operations.

IV.

Answering Paragraph IV, defendant admits that on or about the evening of July 17, 1952, and for many years previous thereto, the defendant had maintained certain railroad yards, including [26] various repair tracks, inspection tracks and the usual trackage which is common in railroad yards generally; that on or about the evening of July 17,

1952, the said minor Gerald Stintzi was engaged in the performance of duties for his employer Addison-Miller Company, and at said time defendant railway company was engaged in switching operations in its yard. Save and except as herein specifically admitted, the defendant denies each and every other matter and thing in said paragraph contained whether as therein alleged or otherwise.

V.

Answering Paragraph V, defendant admits that on July 17, 1952, at approximately 8:20 p.m., Gerald Stintzi was involved in an accident and received severe and permanent injuries. Defendant denies each and every other matter or thing therein contained.

VI.

Defendant denies Paragraph VI.

VII.

Answering Paragraph VII, defendant admits that Gerald Stintzi was severely injured, but specifically denies that the said injuries were the proximate result of defendant's negligence, and denies each and every other matter or thing therein contained.

VIII.

Answering Paragraph VIII, defendant admits that Gerald Stintzi received severe injuries, but denies each and every allegation, matter or thing contained in said paragraph, as defendant does not

have sufficient knowledge or information upon which to form a belief.

IX.

Answering Paragraph IX, defendant admits that following the injuries to said minor, he was hospitalized and received medical care. Defendant specifically denies that, as a result of any negligent act on its part, its servants, agents or employees, [27] plaintiff incurred hospital and doctor bills and expense for prosthetic devices, and expense for car and transportation and other incidental items of expense, in the amount of \$10,845.86 or in any amount, and will incur future medical expense and has been damaged in the sum of \$250,000.00, or in any amount whatsoever.

For further answer and first affirmative defense, defendant alleges that if the minor Gerald Stintzi received any injuries, the same were the result of his own negligence, materially and proximately contributing thereto.

For further answer and second affirmative defense, defendant alleges that if said injuries received by the minor Gerald Stintzi were not the result of his own negligence, materially and proximately contributing thereto, that said injuries were the proximate result of the negligence of the said minor's employer Addison-Miller, Inc., its servants, agents or employees.

For further answer and third affirmative defense, defendant alleges:

That at all times subsequent to July 18, 1936, defendant Northern Pacific Railway Company

owned the land and plant referred to in the Amended Complaint herein, which plant was operated by Addison-Miller, Inc., the employer of plaintiff herein. That at all times subsequent to July 18, 1936, Addison-Miller, Inc. has been operating said plant pursuant to a contract entered into between defendant and Addison-Miller, Inc. on said 18th day of July 1936, and said contract has at all times since said date been in full force and effect. In said contract, Addison-Miller, Inc. is referred to as the "Contractor," and said contract, among other things, provides: [28]

"The Contractor shall at all times, at its own cost and expense, comply with all requirements of the Workmen's Compensation Act of the State of Washington, and hereby agrees to indemnify and save the Railway Company harmless from all claims and causes of action by employees of the parties hereto or third persons, on account of personal injuries, death or damage to property in any manner caused by, arising from, or growing out of the maintenance or operation of the said ice plant, or handling of ice under this contract."

That plaintiff Gerald Stintzi entered into the employment of Addison-Miller, Inc. while the aforesaid contract was in full force and effect and long after its execution. That plaintiff's said employer Addison-Miller, Inc. has at all times mentioned in the Complaint complied with the requirements of the Workmen's Compensation Act of the State of Washington and paid when due all amounts required

under the said compensation act as to the employment of plaintiff, and plaintiff was, at the time of his injury, July 17, 1952, covered under the terms of said Workmen's Compensation Act and entitled to the benefits provided by said act, and that Addison-Miller, Inc. was and is likewise entitled to the benefits of the said Workmen's Compensation Act as to plaintiff's said injury.

That, immediately following the occurrence of plaintiff's said injury, and within the time required by the said Workmen's Compensation Act, plaintiff's said employer Addison-Miller, Inc. filed notice of said injury with the State of Washington with the Supervisor of Industrial Insurance, as required by the terms of said Act.

Wherefore, this defendant, having fully answered plaintiff's Amended Complaint, prays that the same be dismissed, that the plaintiff take nothing thereby, and that this defendant have its costs and disbursements herein incurred.

CANNON, McKEVITT & FRASER

/s/ By F. J. McKEVITT,

CASHATT & WILLIAMS

/s/ By LEO N. CASHATT,

Attorneys for the Defendant. [29]

Duly Verified. [30]

Acknowledgment of Service attached.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT OF
CONTENTIONS

Comes now the plaintiff Gerald Stintzi through his Guardian ad Litem Clara Stintzi and states that the following contentions will be made on his behalf on trial of the above action in the United States District Court on June 28, 1954:

First: Gerald Stintzi is a minor who was of the age of 17 years on July 17, 1952 and is represented by his mother Clara Stintzi, his acting Guardian ad Litem.

Second: The Northern Pacific Railway Company is a common rail carrier and on and prior to July 17, 1952, maintained and operated a railroad yard and yard shops at Yardley, Spokane County, Washington.

Third: The Addison-Miller Company is a corporation and on and prior to July 17, 1952, by virtue of a contract with the Northern Pacific Railway Company performed certain icing operations for the Northern Pacific at Yardley, Washington.

Fourth: On and prior to July 17, 1952, the minor plaintiff was employed by the Addison Miller Company and was engaged as a laborer in the performance of said car icing operations. That in the performance of his duties the minor plaintiff Gerald Stintzi was required to work and be on, around and about railroad cars of the defendant, which were from time to time left standing on trackage imme-

diately alongside the icing dock at Yardley, Washington, and particularly on and about cars which were from [37] time to time spotted and left standing on a railroad track known as track 13 located immediately to the north of said icing dock.

Fifth: On the evening of July 17, 1952, a number of railroad cars had been spotted and left standing extending in an easterly and westerly direction on said track 13 immediately adjacent and to the north of defendant's icing dock at Yardley, Washington. On said evening the minor plaintiff Gerald Stintzi, pursuant to instructions given to him by the foreman of Addison Miller Company, was assisting in cleaning out slush ice accumulated in the slush pit within defendant's icing dock, which slush ice, pursuant to instructions, was being emptied or dumped in a ditch or depression immediately to the north of said track 13 and to the north of said railroad cars spotted and left standing on said track 13.

Sixth: While in the performance of said duties and at proximately 8:20 p.m. and July 17, 1952, the minor plaintiff Gerald Stintzi was required to stand and was standing alongside and partially between two cars of the defendant railway company which were in the line of cars previously spotted and left standing on track 13 immediately to the north of the defendant's icing dock. The defendant negligently and without any warning of its intention so to do, disengaged and uncoupled a number of freight cars at a point some distance to the west of defendant's icing dock and allowed said cars to

drift and proceed down track 13 and to come into sudden and violent contact with the stationary cars spotted immediately beside defendant's icing dock. As a result, the stationary cars spotted and left standing on track 13, including the two cars alongside and between which the minor plaintiff Gerald Stintzi was working, were caused to be set in motion, throwing the minor plaintiff under the moving wheels thereof, dragging him along track 13 and inflicting severe injuries upon him.

Seventh: The minor plaintiff's injuries and damages were proximately caused by the negligence of the defendant, its agencies, employees and servants in one or more of the following respects:

1. That the defendant, its agents and servants negligently failed to keep a proper lookout and to use proper care for the safety of said Gerald Stintzi while he was in the performance [38] of his duty;

2. That the defendant, its agents and servants negligently failed to give to said Gerald Stintzi, any notice or warning that any railway cars were to be moved and shoved onto and against the railway cars about which the said Gerald Stintzi was working;

3. That the defendant, its agents and servants negligently moved and switched railway cars onto, over and against the said line of cars about which said Gerald Stintzi was working;

4. That the defendant, its agents and servants in charge of its switching operations, negligently moved, operated and controlled said switching operations and the cars involved therein;

5. That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being switched against those being iced and on which the said Gerald Stintzi was working, negligently moved said engine and said train and said cars involved at an excessive and dangerous rate of speed under the circumstances obtaining;

6. That at all times herein mentioned, the defendant, its agents, servants and employees, had full knowledge and notice, or in the exercise of ordinary care should have had full notice and knowledge, that the said Gerald Stintzi and/or other employees of defendant or other persons employed by other parties and by Addison Miller Company would be working on or about said railway cars spotted beside the defendant's loading dock, but that notwithstanding its said knowledge and notice, the defendants, its agents, employees and servants negligently caused the said cars to be switched, moved or pushed onto and against the said stationary cars spotted and standing on the track adjacent to the defendant's loading dock and where said Addison Miller Company was carrying on its icing operations, without notice or warning of any kind;

7. That the defendant, its agents, employees and servants in charge of said train and cars were switched negligently, moved the same without keeping the same under reasonable and proper control at all times.

Eighth: That by reason of defendant's negli-

gence in one or more of the particulars above charged, and as a proximate result of said defendant's negligence as aforesaid, the said Gerald Stintzi was severely injured in and about his entire body; that the right leg of said Gerald Stintzi was crushed and mangled and traumatically amputated near the hip joint; that the skin of the right lower abdomen and buttocks was torn away from the underlying tissues and extensive lacerating wounds were suffered by said Gerald Stintzi which wounds extended into the rectum; and there was a complete avulsion of the right scrotum and a rupture of the urethra; that the left femur was fractured in a comminuted manner at the junction of its middle and upper third, [39] and the said Gerald Stintzi also suffered multiple contusions about the knee and hip joint on the left hand side and said Gerald Stintzi also sustained comminuted fractures of both bones of the right forearm at about the mid point of the lower arm; that said injuries are permanent and as a result thereof the said minor, Gerald Stintzi, will be totally disabled and incapable of engaging in gainful occupation for the balance of his life.

Ninth: That the said Gerald Stintzi sustained a severe shock unto his entire nervous system and his general health and wellbeing has been greatly injured and impaired and all of said injuries have caused the said Gerald Stintzi great pain and suffering, although while at the time of said injuries said minor Gerald Stintzi was of the age of 17

years and in good health and physical condition; that said minor sustained great and extreme pain and suffering; that the treatment of said Gerald Stintzi required numerous transfusions, a guillotine re-amputation of the right femur approximately three inches below the hip point, with removal of devitalized skin and said Gerald Stintzi likewise sustained extreme suffering by the replacement of the right testicle in the scrotum and throughout the whole treatment and repair of the said Gerald Stintzi; that the said Gerald Stintzi was required to submit to surgery numerous times, at which times treatment was accorded to the said Gerald Stintzi and surgical procedures were engaged in, and there were skin grafts performed which caused great and additional pain and suffering. That surgery was performed on the right forearm of the said Gerald Stintzi and he remained under treatment at a hospital for a period of time in excess of nine months; and said Gerald Stintzi, as a result of his injuries, has been unable to use an artificial limb and he will always suffer from disfigurement, humiliation and embarrassment resulting from his said injuries, and said Gerald Stintzi will require a considerable amount of constant care for many years.

Tenth: That the said Gerald Stintzi, as a result of the injuries sustained, has incurred hospital expenses in the present amount of \$6,683.05, doctors' bills in the present amount of over \$3,000.00, expense for prosthetic devices in the amount of \$662.81, expense for car and transportation [40] in

a sum in excess of \$500.00, and other incidental items of expense, the full amounts of which are not known; that likewise, by reason of the injuries and suffering occasioned and to be endured in the future, and by reason of the minor plaintiff's future inability to engage in gainful occupation, and by reason of the necessity for future personal care, and by reason of all of the injuries sustained, and the humiliation and mortification heretofore alleged, the said minor plaintiff, Gerald Stintzi, has been damaged in the sum of \$250,000.00.

/s/ JOHN D. MacGILLIVRAY

/s/ R. MAX ETTER

/s/ JOHN T. DAY

Acknowledgment of Service attached. [41]

[Endorsed]: Filed June 21, 1954.

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT OF CONTENTIONS

Comes now the defendant and submits the following as its statement of the contentions that will be made on its behalf on the trial of the above cause:

I.

That the duties of the plaintiff Gerald Stintzi, in connection with his employment by Addison-Miller Company, did not require him to work and

be on, around or about railroad cars of the defendant except the top of such refrigerator cars as were from time to time being iced by Addison-Miller Company, and the said Gerald Stintzi had no right to be elsewhere on, around or about railroad cars of the defendant in defendant's railroad yard at Yardley, Washington, and particularly had no right to be between or under any cars, refrigerator or otherwise, nor any right to be on any of the defendant's trackage.

II.

That the defendant Gerald Stintzi was not at the time of his injury engaged in icing operations, and particularly not engaged in icing operations as that term is employed in the contract between defendant and Addison-Miller Co. referred to and alleged [43] in Paragraph III of plaintiff's Amended Complaint.

III.

That neither defendant nor any of its agents or employees had any knowledge prior to the injury of Gerald Stintzi that he was about any of the cars in defendant's yard at Yardley, Washington, and particularly no knowledge that the said Gerald Stintzi was on defendant's trackage and between two of such cars.

IV.

That if the said Gerald Stintzi had any right to be standing on defendant's trackage and between cars on such trackage, neither the defendant nor its agents or employees was guilty of any of the acts of negligence charged by plaintiff, nor of any

negligence whatsoever which was a proximate cause of plaintiff's injuries.

V.

That the plaintiff Gerald Stintzi was himself guilty of negligence which proximately contributed to his injury and assumed the risk in these respects:

(a) That he voluntarily placed himself on defendant's trackage and between two of the cars on said trackage at a time when he knew or should have known that said cars were liable to be moved by defendant, and that he was exposing himself to great danger.

(b) That the said Gerald Stintzi voluntarily entered a place of great danger between two of the cars standing on defendant's trackage in its yards without making any effort whatsoever before doing so to determine whether or not there was any likelihood that such cars might be moved by defendant.

CANNON, McKEVITT & FRASER

/s/ By F. J. McKEVITT

CASHATT & WILLIAMS

/s/ By LEO N. CASHATT

Attorneys for the Defendant.

Acknowledgment of Service attached.

[44]

[Endorsed]: Filed June 28, 1954.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

* * * * *

Requested Instruction No. 3

If you find under the other instructions that I have given you that Gerald Stintzi was an invitee at the place of his injury and that Northern Pacific Railway Company was guilty of negligence which was a proximate cause of his injury, then you should proceed to determine whether or not Gerald Stintzi was himself guilty of negligence which proximately contributed to his injury. In this connection, you are instructed that contributory negligence of a plaintiff when established is a complete defense to an action of this type. No matter how negligent the defendant Northern Pacific Railway Company may have been, if Gerald Stintzi was himself guilty of some negligence which proximately and materially contributed to the occurrence of the injury, he cannot recover. The burden of proving contributory negligence is upon the defendant.

A person is guilty of contributory negligence if he fails to exercise the care which an ordinarily prudent person would use under the same or similar circumstances and his failure proximately and materially contributes to the occurrence of his injury. Ordinary prudence or reasonable care requires that

a person in possession of his faculties exercise reasonable and ordinary care for his own safety. One may not cast the burden of his own protection upon another, but at all times owes himself the duty of self-protection. The law will not permit one to close his eyes to danger and if thereby injured seek a remedy in damages against another. One is at all times bound to use his intellect, senses and faculties for his own protection.

You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous [1070] method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger.

Therefore, if you should find from a preponderance of the evidence that Gerald Stintz, in going between the freight cars in question and beneath the couplings, failed to exercise reasonable care for his own protection, and that such failure proximately contributed to his injury, then Gerald Stintzi was guilty of contributory negligence and cannot recover in this action, and your verdict should be for defendant, notwithstanding that you may also find that the defendant was guilty of negligence. On the other hand, if you should find that Gerald Stintzi was an invitee and that the defendant was guilty of negligence which was a proximate cause of his injury and you should further find that Gerald

Stintzi was not contributorily negligent, your verdict should be for the plaintiff. [1071]

* * * * *

Requested Instruction No. 5

You are instructed that any negligence on the part of Addison Miller Company, or on the part of its foreman, in directing plaintiff to cross the track in question or in failing to take precautions to protect plaintiff while he was so doing, cannot be considered by you as negligence on the part of Northern Pacific Railway Company. The defendant in this case, Northern Pacific Railway Company, is in no way chargeable with or responsible for any negligence on the part of Addison Miller Company or its foreman which may have caused or contributed to plaintiff's injury. If you should find that the sole cause of plaintiff's injury was negligence on the part of Addison Miller Company or its foreman, or that the sole cause of plaintiff's injury was the concurrent negligence of plaintiff himself and Addison Miller Company or its foreman, then your verdict must be in favor of the defendant. [1073]

[Endorsed]: Filed July 1, 1954.

* * * * *

Requested Instruction No. 6

Aside from all other instructions that I have given you, you are instructed that if you should find from a preponderance of the evidence that there were no cars being iced on track 13, nor any car or cars on track 13 from which salt was being

unloaded by Addison Miller employees during the time that Gerald Stintzi was crossing track 13 between and underneath the couplings of the freight cars, your verdict must be for the defendant. [1074]

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above Entitled Cause, find for the plaintiff, and assess damages in the sum of \$148,500.00.

/s/ GEORGE WEIFORD,
Foreman [1088]

[Endorsed]: Filed July 3, 1954.

In the District Court of the United States, Eastern
District of Washington, Northern Division

No. 1052

CLARA STINTZI, Guardian Ad Litem of Gerald
Stintzi, a minor, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Defendant.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver, presiding, with all parties appearing by counsel and the issues

having been duly tried, and the jury, on the 3rd day of July, 1954, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of \$148,500.00 (One Hundred Forty Eight Thousand Five Hundred Dollars);

It Is Ordered and Adjudged that the plaintiff recover of the defendant the sum of \$148,500.00 (One Hundred Forty Eight Thousand Five Hundred Dollars) and his costs of action.

Dated at Spokane, Washington, this 3rd day of July, 1954.

/s/ STANLEY D. TAYLOR,
Clerk [1089]

[Endorsed]: Filed July 3, 1954.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT ENTERED THEREON AND
FOR JUDGMENT IN ACCORDANCE
WITH DEFENDANT'S PRIOR MOTIONS
FOR A DIRECTED VERDICT; AND
ALTERNATIVE MOTION FOR A NEW
TRIAL.

Comes now the defendant and moves the Court to set aside the verdict the jury returned in this cause on the 3rd day of July, 1954, and the judgment in favor of the plaintiff entered on said verdict on the 3rd day of July, 1954, and further moves

the Court to have judgment entered in favor of defendant in this cause in accordance with the defendant's motion for a directed verdict made at the close of plaintiff's evidence and defendant's motion for a directed verdict made at the close of all of the evidence. This motion is made upon the same grounds as were stated in support of said motions for a directed verdict, that is, (1) that as a matter of law plaintiff Gerald Stintzi was not an invitee on defendant's premises at the time and place of his injury; (2) that even if Gerald Stintzi was an invitee, there was no evidence or reasonable inference from evidence that defendant was guilty of any negligence which was a proximate cause of injury to Gerald Stintzi; and (3) that Gerald Stintzi was guilty of contributory negligence as a matter of law.

This motion is made pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure. [1090]

In the event the foregoing motion is denied, and not otherwise, then the defendant moves the Court for a new trial upon the following grounds which materially prejudiced the substantial rights of defendant on the trial of this action:

I.

Irregularity in the proceedings of the Court, jury, or adverse party, or any order of the Court or abuse of discretion by which the defendant was prevented from having a fair trial.

II.

Misconduct of the prevailing party, his attorneys or the jury.

III.

Accident or surprise which ordinary prudence could not have guarded against.

IV.

Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice.

V.

Insufficiency of the evidence to justify the verdict or decision.

VI.

Errors in law occurring at trial and excepted to by defendant.

Defendant's motion alleging insufficiency of the evidence to justify the verdict or decision or judgment is based upon the following grounds, to-wit:

(a) The testimony of witnesses both for the plaintiff and the defendant proved, as a matter of law, that the minor Gerald Stintzi, at the time and place where his injuries were sustained, was a trespasser, in that his injuries occurred on property owned by the defendant Northern Pacific Railway Company. The work in which he was engaged was not the icing of cars of the defendant, [1091] the unloading of salt cars of the defendant, nor was such work in anywise icing operations within the meaning of the contract between Addison Miller, Inc. and the Northern Pacific Railway Company, Inc.; the said Gerald Stintzi was not upon the property of the said defendant at the time of his injuries by invitation, either express or implied; there was no evi-

dence of probative value that the Northern Pacific Railway Company had ever given permission to the Addison Miller Company to dump slush ice north of track 13; the testimony of Gerald Stintzi himself was to the effect that during the whole course of his employment with Addison Miller Company in 1951 and 1952, he had never dumped slush ice north of track 13; to the same effect was the testimony of his co-employees; there was an utter absence of evidence of any kind or character that in the performance of any duty for Addison Miller Company, its employees had crossed track 13 for any purpose by climbing over cars, between cars, or under the couplings of cars of the defendant railway company; the evidence conclusively showed that for a long period of time, and by agreement between Addison Miller Company and the defendant railway company, it was the duty of Addison Miller Company, when engaged in icing operations of any kind or character, to place a blue light on the top of its icing dock, which would serve as a warning to Northern Pacific employees that track 13 was being used for the purposes contemplated by the agreement between said Addison Miller Company and the Northern Pacific Railway Company; the uncontradicted evidence was that at the time of his injuries, no blue light was present; the evidence conclusively shows that at the time of his injuries, Gerald Stintzi was not working on, in, around or under any car of the Northern Pacific Railway Company which was in anywise being used for icing operations; the evidence conclusively shows that the employees of

the Northern Pacific Railway Company had no knowledge, actual or constructive, of the presence of Gerald Stintzi at the place where [1092] he was injured, or any reason to anticipate that any employee of Addison Miller Company would be engaged in the dumping of slush ice across track 13 in any manner whatsoever, and particularly by crawling under the couplers of its cars in order so to do; the evidence conclusively shows that Gerald Stintzi did not sustain his injuries as the result of any willful or wanton act on the part of said defendant; the evidence conclusively shows that the said Gerald Stintzi was guilty of contributory negligence as a matter of law in that he knew, or should have known, that it was inherently dangerous to cross railroad tracks within switching yards, especially by crawling under the couplings of coupled cars; the evidence conclusively shows that even though said Gerald Stintzi was directed by his foreman to dump the slush ice north of track 13, he was not instructed by said foreman to pass between railroad cars, or under or over the couplings of coupled cars; the evidence conclusively shows that the area on which the accident occurred was not covered by the contract between the Addison Miller Company and the Northern Pacific Railway Company; the evidence conclusively shows that the switching movement out of which Gerald Stintzi's injuries arose, was common and standard practice in the switching yards of the major railroads of the United States; the evidence conclusively shows that there were other areas immediately adjacent

to the door leading from the slush pit area where the slush ice could have been dumped without crossing track 13; there was substantial and credible evidence that the foreman of Addison Miller Company, observing Gerald Stintzi and his companion passing between these cars, had warned them to desist from so doing, and advised them of the danger of so doing.

The errors in law occurring at the trial were the following:

1. The Court erred in admitting in evidence, over the objection of defendant, testimony concerning a portion of Rule 805 of [1093] the Consolidated Code of Operating Rules, and in admitting said portion of Rule 805 in evidence as Exhibit No. 47, which said portion of Rule 805 reads as follows:

“Before moving cars or engines in a street or on a station or yard track, it must be known that they can be moved with safety. Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone.”

No rule violation was pleaded in the amended complaint, nor was any rule violation set forth in plaintiff's statement of the issues and contentions. Furthermore, an examination of this rule clearly indicates that it was not enacted for the benefit of a third person engaged in the type of work that Gerald Stintzi was performing prior to and at the time of his injuries.

2. The Court erred in admitting in evidence, over

defendant's objection, testimony concerning the blue flag rule found in the Consolidated Code of Operating Rules, for the reason and upon the grounds that said rule had no application to a person engaged in the type of work Gerald Stintzi was performing at the time of his injuries, and furthermore that said rule was one enacted for the protection of employees of the defendant, and not employees of third parties.

3. The Court erred in admitting in evidence over defendant's objection testimony to the effect that following the injuries sustained by Gerald Stintzi new and different safety methods for the protection of Addison Miller Company's employees were put into effect, for the reason that such evidence was wholly incompetent and immaterial and did not tend to prove or disprove any issue in the case and was highly prejudicial to defendant.

4. The Court erred in admitting in evidence over objection of defendant testimony of the presence of a salt car on track 13 for the reason and upon the grounds that even assuming the presence of such a car, there was an utter absence of evidence that Gerald [1094] Stintzi was on, in, or between said car or that he was in anywise engaged in the unloading of salt.

5. The Court erred in admitting in evidence over defendant's objection testimony with reference to the loud speaker system in defendant's yards, for the reason and upon the ground that there was no evidence that prior to the date of Gerald Stintzi's injuries this loud speaker had ever been used to

warn employees of Addison Miller Company of contemplated switching operations.

6. The Court erred in admitting in evidence plaintiff's exhibits 26 to 33, both inclusive, and the manner and method in which these pictures were exhibited to the jury in an open, darkened Court room, by means of having them projected against a beaded screen 40 inches by 40 inches, by the use of a projector which enlarged said pictures twenty to twenty-one times their normal size, and in permitting, over defendant's objection, a detailed explanation of each exhibit as it was thrown on the screen, by the witness, Dr. Valentine. The full nature and extent of Gerald Stintzi's injuries were gone into at great length by the witness, Dr. Valentine, prior to the showing of these pictures. The Courtroom exhibits of these pictures in the manner above described was cumulative testimony of a highly prejudicial character, and could serve no purpose other than to arouse the passion and prejudice of the jury, and to influence the amount of their verdict.

7. The Court erred in instructing the jury with reference to Rule 805 hereinabove referred to, for the reasons and upon the grounds heretofore stated.

8. The Court erred in instructing the jury that if the defendant had knowledge of or should have anticipated the presence of any Addison Miller employees "on or about the dock," it would be guilty of negligence if it did not exercise due care. This instruction was erroneous in that it permitted the jury to find the defendant liable if guilty of negligence, even if Gerald [1095] Stintzi was a trespass-

ser or licensee; furthermore, there was no evidence that Gerald Stintzi, at the time he was injured, was employed on or about the icing dock of Addison Miller Company.

9. The Court erred in instructing the jury that if they found that Addison Miller Company, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and that if the jury further found that the Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately in any measure to the injuries sustained by Gerald Stintzi, that the jury was instructed that the negligence of Addison Miller Company could not be imputed to Gerald Stintzi, and that he would not be liable for such employer's negligence, and that the jury should disregard any evidence of negligence of Gerald Stintzi's employer, and return its verdict for the plaintiff. This instruction was error because the jury was told that defendant would be liable if guilty of negligence "in any degree", which was the same as telling the jury that liability might be based on slight negligence, whereas the proper standard is ordinary negligence, or the failure to use ordinary care, assuming Stintzi was an invitee. This instruction was also erroneous wherein the jury was told that defendant was liable if its negligence "contributed proximately in any measure," whereas the law of proximate cause is that negligence must ma-

terially cause or contribute to cause the injury; defendant's objection being specifically directed in this connection to the words "in any measure." The overall effect of this instruction was to permit the jury to find in favor of the plaintiff, if they found that defendant was guilty of any negligence, however slight, and even though said negligence was not a proximate cause of plaintiff's injuries. [1096]

10. The Court erred in instructing the jury on concurring negligence of the defendant Northern Pacific Railway Company and Addison Miller Company for the reason and upon the grounds:

(a) There was no evidence of a substantial character that the defendant was guilty of actionable negligence.

(b) This instruction should have been qualified with a further statement that if Gerald Stintzi was a trespasser or licensee, he could not recover in any event.

11. The Court erred in refusing to give that portion of defendant's requested instruction No. 3, reading as follows:

"You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger."

The quoted language was a proper statement of the law particularly applicable to the issues of fact

of this case and not covered by any of the instructions given by the Court.

12. The Court erred in refusing to give defendant's requested Instruction No. 5, for the reason that this requested instruction was a proper statement of the law particularly applicable to the issues of fact in this case and was not covered in any of the other instructions given by the Court.

13. The Court erred in refusing to give defendant's requested instruction No. 6, for the reason that this requested instruction was a proper statement of the law particularly applicable to the issues of fact in this case and was not covered in any of the other instructions given by the Court.

14. The Court erred in refusing to give defendant's requested instruction No. 7, for the reason that this requested instruction was a proper statement of the law particularly applicable to the issues of fact in this case and was not covered in any [1097] of the other instructions given by the Court.

This motion is made upon all of the pleadings and papers on file herein, and upon the "minutes of the Court," and under the provisions of Rule 59 of the Federal Rules of Civil Procedure.

Dated this 12th day of July, 1954.

CANNON, McKEVITT & FRASER

/s/ By FRANK J. McKEVITT

CASHATT & WILLIAMS

/s/ By LEO N. CASHATT

[1098]

Acknowledgment of Service attached.

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE VERDICT AND JUDGMENT ENTERED THEREON AND FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S PRIOR MOTIONS FOR A DIRECTED VERDICT; AND ALTERNATIVE MOTION FOR A NEW TRIAL.

On September 7th, 1954, pursuant to notice, the defendant's Motion to Set Aside Verdict and Judgment Entered Thereon and for Judgment in Accordance with defendant's Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial, came on for hearing before the Court, the defendant being represented by Cashatt & Williams, and Cannon, McKevitt & Fraser, its attorneys; and the plaintiff being represented by R. Max Etter and John D. MacGillivray, her attorneys of record;

The defendant, by its attorneys, submitted a brief and memorandum of authority in support of its Motions and said Motions were duly argued to the Court by counsel for defendant and for plaintiff, and the Court thereupon advised counsel for the parties, plaintiff and defendant, that said Motions and the Court's determination thereon would be taken under advisement and for consideration;

Now, therefore, the Court having taken said Motions under advisement and having considered them, each and all, and having examined the files, records and notes of the proceeding, and having examined

and considered the brief and memorandum of defendant in support of its Motions, and having heard the argument of counsel for both parties, and having considered all of said argument, and all [1099] of the matters appertaining to said cause and having advised respective counsel by letter of September 28th, 1954, that said Motions would be denied;

Now, therefore, on the Motion of defendant to Set Aside Verdict and Judgment Entered Thereon and for Judgment in Accordance with Defendant's Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial,

It is ordered that said Motions, and each of them, be denied.

Exception allowed.

Done in open court this 12th day of October, 1954.

/s/ SAM M. DRIVER,

United States District Judge.

Presented and submitted by: Signed R. Max Etter,
John P. MacGillivray, attorneys for Plaintiff.

Approved as to form: Cashatt & Williams, signed
by: Leo N. Cashatt; Cannon, McKevitt &
Fraser; signed by: F. J. McKevitt, attorneys
for defendant. [1100]

[Endorsed]: Filed October 12, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Northern Pacific Railway Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on July 3, 1954, and filed of record in the above entitled Court on said date, and from each and every part thereof.

Notice Is Also Given that the Northern Pacific Railway Company, a corporation, appeals to said court from that certain order entered in the above entitled Court on October 12, 1954, denying the motion of defendant, Northern Pacific Railway Company, a corporation, to set aside the verdict returned in said action and the judgment entered thereon or in the alternative for a new trial, and from each and every part of said order.

Dated this 4th day of November, 1954.

CASHATT & WILLIAMS,

/s/ By LEO N. CASHATT,

/s/ F. J. McKEVITT,

Attorneys for Defendant [1101]

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents that Northern Pacific Railway Company, a corporation, as Prin-

cipal, and Saint Paul Mercury Indemnity Company, Saint Paul, Minnesota, a corporation organized under the laws of the State of Delaware and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto Clara Stintzi, Guardian ad Litem of Gerald Stintzi, a minor, Plaintiff in the above entitled action, in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said Clara Stintzi, Guardian ad Litem of Gerald Stintzi, a minor, her executors, administrators or assigns, and/or to the said Gerald Stintzi in the event he shall have attained the age of majority under the laws of the State of Washington at such time as the conditions of this bond may become effective; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of November, 1954.

Whereas, lately at the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit *depending* in said Court between Clara Stintzi, Guardian ad Litem of Gerald Stintzi, Plaintiff, and the Northern Pacific [1102] Railway Company, a corporation, a judgment was rendered against the said defendant, Northern Pacific Railway Company, a corporation, in the sum of One Hundred Forty-eight Thousand Five Hundred Dollars (\$148,500.00), and the said defendant, Northern Pacific Railway Company, a corporation, having filed in said Court a

Notice of Appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit at a session of said Court to be holden at San Francisco, in the State of California.

Now, the Condition of the Above Obligation Is Such That if the said Northern Pacific Railway Company, a corporation, shall prosecute said appeal and secure to the plaintiff the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY
COMPANY, a corporation,

By CASHATT & WILLIAMS,

/s/ By LEO N. CASHATT,

/s/ By F. P. McKEVITT,

Its Attorneys

[Seal] SAINT PAUL MERCURY INDEMNITY COMPANY, St Paul, Minn.,

/s/ By JOSEPH L. COX,

Attorney in Fact

[1103]

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant hereby designates that the record on appeal of this cause to the United States Court of

Appeals for the Ninth Circuit shall contain the complete record of the proceedings in the above entitled court and all proceedings and evidence in the action, and particularly shall include, but not be limited to, the following:

1. Complaint in the Superior Court of the State of Washington for Spokane County.
2. Petition for removal.
3. Bond for removal.
4. Notice of filing Petition and Bond for Removal.
5. Official reporter's complete transcript of all the evidence and proceedings upon the trial of this cause.
6. Originals of all exhibits introduced in evidence on the trial of this cause.
7. Notice of Appeal.
8. Bond on Appeal.
9. This Designation.

Dated this 9th day of November, 1954.

CASHATT & WILLIAMS,
/s/ By LEO N. CASHATT,
CANNON, McKEVITT & FRASER,
/s/ By F. J. McKEVITT,
Attorneys for the Defendant

Acknowledgment of Service attached. [1105]

[Endorsed]: Filed November 10, 1954.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that a Notice of Appeal was filed in the above entitled cause by the defendant on November 5, 1954, and upon oral motion of counsel for the defendant, it is hereby

Ordered that the time to file and docket the record on appeal in the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including January 31, 1955.

Dated this 26th day of November, 1954.

/s/ SAM M. DRIVER,

United States District Judge [1106]

[Endorsed]: Filed November 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington do hereby certify that the documents annexed hereto are the originals filed in the above entitled cause, called for in Defendant's Designation of Contents of Record on Appeal, to-wit:

Petition for Removal; Stipulation extending time

to appear; Summons—Superior Court—Complaint—Superior Court.

Bond for Removal.

Notice of filing Petition and Bond for Removal.

Motion for more definite statement.

Order granting motion.

Notice of joinder of counsel.

Amended Complaint.

Motion for more definite statement (**Amended Complaint**).

Answer to Amended Complaint.

Motion for more definite statement (**Affirmative Defense**).

Motion to Dismiss (**Affirmative Defense**).

Order ruling on Motions.

Plaintiff's Statement of Contentions.

Notice of Trial Amendment.

Defendant's Statement of Contentions.

Court Reporter's Transcript of Evidence, four volumes.

Defendant's Requested Instructions.

Defendant's Additional Requested Instructions.

Plaintiff's Requested Instructions.

Verdict for Plaintiff.

Judgment on Jury Verdict.

Motion to set aside Verdict and Judgment thereon and for Judgment in accordance with Defendant's prior Motions for a directed Verdict and alternative Motion for New Trial.

Order denying defendant's Motion to set aside Verdict and Judgment entered thereon and for Judgment in accordance with Defendant's prior

Motions for a directed verdict; and alternative Motion for New Trial.

Notice of Appeal.

Bond on Appeal.

Designation of Contents of Record on Appeal.

Order extending time to docket appeal to 1/31/55.

and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit as set forth in the Appellant's Notice of Appeal filed November 5, 1954, and as called for by Appellant's Designation of Record on Appeal.

I further certify that all exhibits admitted or rejected at the trial, to-wit:

Defendant's 1, diagram of track lay-out.

Plaintiff's 2, photo; 3, photo; 4, photo; 5, photo; 6, photo; 7, photo; 8, photo; 9, photo; 10, photo; 11, photo; 12, photo; 13, photo; 14, photo; 15, photo; 16, photo.

Defendant's 17, statement of Allan Maine.

Plaintiff's 18, statement of Allan Maine.

Defendant's 19, statement of Joe Vallorano.

Plaintiff's 20, photo; 21, photo; 22, photo.

Defendant's 25, work instruction sheet.

Plaintiff's 26, color slide; 27, color slide; 28, color slide; 29, color slide; 30, color slide; 31, color slide; 32, color slide; 33, color slide; 34, hospital bill; 35, Schindler bill; 36, miscellaneous checks.

Defendant's 37, aerial photo; 38, record of perishables 7/17/52; 39, page from Salt Record; 40, page from car turnover record (sheet 6); 41, statement of Boyd Q. Craig; 42, contract between Northern Pacific Railway Co. and Addison Miller; 43, diagram of ice platform; 44, photo; 45, photo; 46, photo.

Plaintiff's 47, portion of Rule 805; 48, photo—rejected; 49, photo—rejected; 50, photo.

Defendant's 51, Rule 805.

are forwarded herewith, but not attached hereto, except Exhibits 1, 37 and 43, which are forwarded under separate cover to Clerk, U. S. Court of Appeals, Post Office Building, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 18th day of January, A. D. 1955.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of
Washington.

In the District Court of the United States, Eastern
District of Washington, Northern Division

Civil No. 1052

CLARA STINTZI, Guardian ad Litem for Gerald
Stintzi, a minor, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, the 28th day of June, 1954, before the Honorable Sam M. Driver, Judge of the said Court, and a jury; the plaintiff being represented by John D. MacGillivray, R. Max Etter and John T. Day, her attorneys; the defendant being represented by Frank J. McKevitt, appearing for Cannon, Mc-Kevitt & Fraser, and Leo N. Cashatt, appearing for Cashatt & Williams, its attorneys; [49*]

Whereupon, the following proceedings were had, to-wit:

The Court: Are we ready now with Stintzi against Northern Pacific?

Mr. Etter: Plaintiff is ready.

Mr. Cashatt: Defendant is ready, your Honor.

* Page numbers appearing at foot of original Reporter's Transcript of Record.

(Whereupon, a jury was duly impaneled and sworn to try the instant cause, after which the following proceedings were had:)

The Court: Now, ladies and gentlemen, this trial will perhaps last several days. It is not going to be a very long trial and not a very short one, either, I think probably three or four days. During that time, we will hold court here ordinarily from 10 to 12 in the morning and from 1:30 to 4 or 4:30 in the afternoon, and then you will be permitted to separate and go your several ways during the noon recesses and the overnight adjournments.

But I want to caution you about discussing the case. You shouldn't discuss it with anyone at all, certainly, outside of the jury. Just tell them you are on the jury and can't talk about it at all. And it is best, also, for you not to even discuss it among yourselves during these [50] recesses or adjournments. Just don't talk about the case. Talk about the weather or something else. Wait until the case is submitted to you finally for your deliberations.

And, also, it is important that you keep an open mind in this case until you have heard all of it on both sides. Naturally, you have to proceed with these cases in some kind of order, and the order here will be that the plaintiff will put on its evidence first. The lawyers will make their opening statements to you first, what they propose to prove, and then put on their evidence, have their witnesses testify, and the plaintiff gets all through then before the defendant comes on. Then the defendant

brings its witnesses on and you will hear all of those witnesses. Then, if there is any rebuttal, you get the rebuttal, and after that the attorneys argue the case and then the Court gives you the instructions as to the rules of law you are to follow, and then you are free for the first time to talk it over among yourselves and make up your minds about what you are going to do. Up to that point, you should keep an open mind and hear both sides and all of the evidence before you make any decision.

And, also, if there is any newspaper account of this trial or radio broadcasts, just skip that part of the news. It is better for you to get all of your impressions from the witnesses in the trial and not a second-hand account [51] by some reporter who is reporting what he considers has gone on here.

Now I am going to take a recess until 1:30. Before I do so, I will excuse the remaining jurors here.

Court will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had:)

The Court: All right, proceed.

Mr. Etter: Your Honor, in order to expedite it, we have talked this matter over with counsel for Northern Pacific and they have prepared a large scale chart of the yards, the switching yards, which are very involved, and with your Honor's permis-

sion, it is an exhibit of the defendant, but we have agreed that it may be placed upon the board which has been constructed at the back and set here in a position so that the jury has a better idea of what we are talking about. Then, if your Honor will permit us, we will make the opening statement and proceed with the case.

I think probably it will expedite the matter and avoid a lot of confusion.

Mr. Cashatt: That is agreeable with us, your Honor.

The Court: That is all right, you may do that.

I think it is stipulated, then, that the map may be admitted as an exhibit?

Mr. Etter: As an exhibit of the defendant, your [53] Honor.

The Court: Defendant's Exhibit 1?

Mr. McKevitt: Yes, your Honor.

The Court: The Clerk will so mark it.

(Whereupon, the said map was marked as Defendant's Exhibit No. 1 for identification.)

(Whereupon, the said map was admitted in evidence as Defendant's Exhibit No. 1.)

Mr. Cashatt: It has also been agreed, your Honor, that a representative from the Engineering Department is here and will explain what the map is.

Is that correct?

Mr. Etter: That is correct, so stipulated, with your Honor's permission.

The Court: All right. I suggest, however, that

you have him sworn so that his testimony may become a part of the record.

Mr. Etter: Certainly, your Honor.

The Court: We haven't an easel big enough to support that, but I support you plan to just put it on the floor there.

Mr. Etter: And we can remove it after we have [54] explained it, your Honor.

W. D. O'HEARNE

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Just step over here, Mr. O'Hearne.

Would you just state your full name again, please? A. W. D. O'Hearne.

Q. And, Mr. O'Hearne, by whom are you employed?

A. Northern Pacific Railway.

Q. And in what department, sir?

A. Division Engineer, in the Engineering Department.

Q. And are you located here in Spokane, Washington? A. Yes.

Q. And how long have you been connected with the Northern Pacific in the capacity that you have just told us?

A. Since the first of last July.

Q. And previous to that, Mr. O'Hearne, what was your occupation?

(Testimony of W. D. O'Hearne.)

A. Well, Assistant Engineer a couple of years and instrument man since '42—or a year before that.

Q. In your work, Mr. O'Hearne, you have to do with the preparation of maps and drawings, and so on, for the [55] Northern Pacific Railway?

A. Yes, sir.

Q. Is that done under your supervision?

A. Yes, sir.

Q. And referring, Mr. O'Hearne, to Defendant's Exhibit No. 1, will you tell us what connection you had with the preparation of this exhibit?

A. Well, I went out and made—with the crew to make the survey, and then the map is made under my supervision.

Q. Mr. O'Hearne, will you proceed and explain to the jury just what is shown here, where it is located, and possibly you could do that without further questioning at this time?

A. Well, the top of the map is north, the bottom is south, east, west (indicating). This is what they call the icing platform, runs down this way. And here is what is called the salt house. That is underneath the icing platform.

This building here is the shed where the ice comes up. Well, maybe I better start over here. Here is the ice plant across the tracks.

Juror No. 7: We can't see the map back here.

The Court: You have trouble seeing it?

Juror No. 7: Can't see it at all. It is very indistinct to me, Judge. [56]

(Testimony of W. D. O'Hearne.)

Mr. Cashatt: Your Honor, could we place it up here and put a chair behind it?

Mr. Etter: We can hold it up.

The Court: I think one difficulty is the lighting here. I have made arrangements to have the lighting modernized in here, but it won't be done in time to help.

Mr. Etter: We can hold it.

The Court: Yes. I think that is better, isn't it?

Several Jurors: Yes.

A. (Continuing) This is the ice plant here (indicating), and this is the tunnel underneath the tracks over to the icing platform. And here is the tunnel shed where the ice comes up through here and goes up to the top of the icing platform and runs along the platform. These are the tracks where they are iced, this track and this track, tunnel Track 13 and 12.

This map is drawn one inch equals 20 feet on the ground.

Do you want me to tell about the doors, and so on and so forth?

Q. (By Mr. Cashatt): I might ask——

The Court: Pardon me just a minute.

Can you raise the whole blind up? I think we will get more light here. Pull it clear up there.

It is sort of a tradition that a courtroom has to [57] be like a cheese cave. I don't know why, I would just as soon have some daylight myself.

Go ahead.

(Testimony of W. D. O'Hearne.)

Q. (By Mr. Cashatt): I might ask you a few questions, it might help to illustrate.

Mr. O'Hearne, where we see two lines, two dark lines, like you see running east and west here, here, and on down the map, what do those two lines represent?

A. That two lines indicates the two rails.

Q. I see.

A. These are switches (indicating); this is a lead track or a ladder track that cars come down. They do their switching in here, come down these separate tracks at these turnouts or switches.

Q. And I see a designation on each two lines, then in the center there is a designation "Track 14," and farther on down Track 3, 2, 1, and so on. Now what significance does that have to the yard out there? A. Well——

Q. By that I mean is that the number of this track?

A. That is the number of a certain track, yes.

Q. I see. On the far end of the west end toward Mr. Etter, there is——

A. That is the yard office and the locker room for the yard men. [58]

Q. And this area is located, Mr. O'Hearne, out at Yardley, Washington?

A. Well, we call it Parkwater.

Q. Parkwater. It is also sometimes known as Yardley, is it? A. I guess it is.

Q. On the west end where Mr. Etter is standing,

(Testimony of W. D. O'Hearne.)

is there any street or any landmark that we could tie this to?

A. Well, I believe it is Havana Street just west of there. I think it is the city limits.

Q. That would be the east city limits of Spokane, Washington?

A. That is what I understand, yes.

Q. And on the east end, is there any landmark, any street or anything?

A. Quite a ways up here is what they call Fancher Way or Fancher overhead crossing.

Q. That is a street which runs north and south, I believe; is that correct?

A. Right.

Q. Now I see the map cuts off at this location here above your dotted lines. Are there other switching tracks, and so on, in the Northern Pacific yards at Parkwater or Yardley which are not shown on Defendant's Exhibit No. 1? [59]

A. Yes, sir.

Q. To the south, Mr. O'Hearne, is this the most southerly track of the yard, the one that I am pointing to?

A. This lower track continues on farther to the west.

Q. But that would be the most southerly track in the Northern Pacific yard in Parkwater; correct, sir?

A. Yes.

Q. You mentioned before, Mr. O'Hearne, about a tunnel. Will you point that out again and show where that runs, now that it is up in the air?

A. That originates at the ice house here and

(Testimony of W. D. O'Hearne.)

runs across over to this shed underneath the tracks, indicated by "Tunnel" here and this dash line.

Q. Now when you say "ice house," I see on Defendant's Exhibit 1 you have marked "Ice Plant." Is that where the ice——

A. They manufacture the ice there, yes.

Q. And you have marked on Exhibit No. 1 "Icing Platform." Is that the end of the platform as shown? A. No, sir.

Q. Go ahead and explain that, please.

A. Well, I don't know exactly how far down here it runs. It runs for a considerable distance.

Q. But is that as far as was taken in?

A. That is as far as taken in on this map, keeping it as [60] small as we could.

Mr. Cashatt: Mr. Etter, do you have any questions?

Mr. Etter: Yes.

Cross Examination

Q. (By Mr. Etter): Mr. O'Hearne, would you take this red pencil, please, and would you point out Track 13 for us?

A. (Indicating on exhibit.)

Q. That is Track 13.

A. That is Track 13.

Q. And, with Mr. Cashatt's consent, would you bring a red line along Track 13, possibly between the middle of the two blackboards, Mr. Cashatt, up to the lead track?

Mr. Cashatt: That is satisfactory.

(Testimony of W. D. O'Hearne.)

A. How far this way? From the tunnel shed, salt house?

Q. (By Mr. Etter): Let's see, from the salt house, yes, just bring it from the salt house right up to the lead track.

A. (Drawing on exhibit.)

Q. You can space that, if you want, Mr. O'Hearne, that red line, rather than draw it all the way.

A. (Witness complies.)

Q. All right, fine. Now you have traced it, have you, from the salt house to what you call the lead track? [61]

A. Yes, lead or ladder.

Q. Lead or ladder.

A. This the ladder track right here (indicating).

Q. Now, also, can you point out up at this west end of the chart where the track is which is referred to as the "Main" or "Old Main?"

A. There (indicating).

Q. Would you mind taking it from this last switch where it switches off on to the lead and bringing it in here about, oh, three inches, just to show where it intersects there?

A. (Witness complies.)

Q. All right, and could you trace with your red pencil down the lead about three or four inches?

A. Down the lead?

Q. Down the lead, yes, up to that second switch.

A. (Witness complies.)

Q. Oh, yes, would you do this, then, for us: Will you take this red line from the yard office and connect it up with your red marks there the same way?

(Testimony of W. D. O'Hearne.)

A. (Witness complies).

Q. That is fine. Will you take these and continue those down to Track 13?

A. (Witness complies).

Mr. Cashatt: Have you finished? [62]

Mr. Etter: Yes.

Redirect Examination

Q. (By Mr. Cashatt): How high is this icing platform from the ground?

A. Well, from the top of the tie, which is practically ground level, it is 15 feet, plus an inch or so difference.

Q. 15 feet?

A. 15 feet, maybe plus an inch.

Q. That was the height the icing platform is from the ground, is that what you just told us?

A. Yes, top of the tie or the ground.

Q. And how wide is the platform? Can you tell us how wide the icing platform is?

A. Well, I would have to scale it or look it up.

Q. And the scale, again, you said?

A. One inch equals 20 feet.

Q. I see.

Mr. Cashatt: Can you think of anything further, Mr. Etter?

Recross Examination

Q. (By Mr. Etter): You may or may not know, Mr. O'Hearne, do you know how [63] many white illuminating lights there are on top of the ice dock?

A. No, I don't.

(Testimony of W. D. O'Hearne.)

Q. You do not?

A. There is some located on here.

Q. But you don't know the number?

A. I don't know the number, sir.

Q. All right. Or the length of the dock?

A. No, sir.

Q. I see. A. I didn't measure it.

Q. Could you give us any idea offhand, if you know, of the distance between these two switches which appear on the west end of the chart in front of the yard office, could you tell us or could you approximate, or do you know, let's put it that way, the distance between that point on the chart and going east until you reach the salt dock, assuming that a car started on Old Main and went off of the lead and turned and was put on to 13 down on the salt dock? Could you tell us how far that is?

A. Well, I could give it to you approximately.

Q. Approximately? A. About 2,050 feet.

Q. 2,050 feet? [64]

A. Something like that.

Q. It is over 2,000 feet, however?

A. Well, it is——

Mr. MacGillivray: Can't we measure it on the map?

Mr. Etter: We can.

A. Yes.

Mr. Etter: Just for purposes of explanation.

Q. Have you any idea how far it is from the point where the car that come off of the lead on to Track 13 up to the edge of the salt house?

(Testimony of W. D. O'Hearne.)

A. You mean from the switch point or——

Q. From the switch point, that is, the switch point off the lead down to the salt dock on the east end?

A. Well, I can tell you how far it is from right there (indicating).

Q. All right. A. 1,201 feet.

Q. 1,201 feet. Thank you.

Mr. Etter: That is all the questions I have.

Mr. MacGillivray: For the record, 1,201 feet is from Switch 13——

A. To the center line of the door into that tunnel shed.

Mr. Etter: Salt house?

A. Well, it is a little west of the salt house.

Mr. Etter: West of the salt house, all right. [65]

Further questions?

Mr. Cashatt: That's all I have.

The Court: I am not sure that the record shows, but it should show that this map, Defendant's Exhibit 1, is admitted in evidence.

Mr. Etter: Fine.

Mr. Cashatt: Mr. O'Hearne may leave now?

Q. (By Mr. MacGillivray): One other question I might ask, what is the distance from the north edge of the loading dock to the southerly track of Track 13? A. How is that again?

Q. From the north edge of the loading dock, or let's say at the salt house, to the southerly track of Track 13?

A. You mean the southerly rail?

(Testimony of W. D. O'Hearne.)

Q. Southerly rail, yes?

A. I don't know exactly.

Q. Could you measure it and tell us?

A. (Measuring) Well, it is about 4 foot and nine-tenths from the edge of the rail, from the rail.

Mr. McKevitt: To what?

A. To the edge, the north edge, of the icing platform.

Mr. Cashatt: Would that be on the ground, Mr. O'Hearne?

A. That is 16 feet up in the air. [66]

Mr. Cashatt: I see.

Mr. Etter: All right. Now is there some place we can put this thing?

The Court: Put that down on the floor. Can the jurors see it there during your opening statement?

Mr. Etter: May I proceed, your Honor?

The Court: All right.

Opening Statement

By Mr. Etter:

Ladies and gentlemen of the jury, as the Court indicated and as you people who have had jury service understand, in the procedure of the trial the plaintiff makes an opening statement. The opening statement is a statement by the party in the litigation of what we expect to prove on behalf of the plaintiff; in other words, the statement is to give you an idea of the evidence that we are going to bring here to you, the witnesses that are going to be here and what they are going to testify to.

In fact, it is a narrative statement of what we expect to prove to you.

Now I might say that we are going to show by the evidence that Gerald Stintzi, the minor boy who was injured who is seated at the table, was about 17 years of age at the time this accident occurred. The accident occurred on the 17th of July of the year 1952 at what has been [67] designated or indicated as Yardley, Washington or Parkwater, Washington. In any event, it occurred in the area which is represented by the chart or the Defendant's Exhibit 1 which has just been explained to you, it was in this area, and, as I will show you later, the accident immediately occurred at the salt dock or thereabouts which was pointed out to you as being on the east end of the chart.

The evidence will show that there are extensive switching operations going on in this particular area at all times; that is, at both ends, both east and west ends of the tracks, and as the chart indicates and as you notice, the proof will show that there are a number of tracks used for yard service besides other tracks which were indicated by Mr. O'Hearne as being north of this particular chart, in other words, other tracks that may be referred to here in the testimony before we get through.

As you note, these tracks run in an easterly and westerly direction. In this direction, we have the west over to our left, down here the east, and, of course as he pointed out, up is north and then down is south.

The evidence will further show that at the time

this accident occurred there was a considerable amount of activity being carried on at what has been referred to—I will walk up here and point it out to you again—as the so-called icing platform, in and about the icing platform [68] and the salt house.

I might explain to you while I am here, and it is diverging a little from the exact narrative but it will be a further explanation, we will show that down in this part of the chart which appears on the west end and which is designated “Ice Plant” on the chart is the place where ice is manufactured and prepared by the Addison Miller Icing Company; that the ice is frozen in the blocks and then, it is sent underground by virtue of a conveyor belt which goes in a northerly direction from the ice house underneath all of these tracks which you see running in an easterly and westerly direction and crosses under these tracks to a point which is indicated under the designation “Tunnel Shed.” This ice, when it comes into the tunnel shed on this conveyor chain, as it comes into the opening it makes a turn in the direction of the west in the tunnel shed and it is then, of course, the lower level and underneath the ground level or the track level of the shed. This conveyor belt brings it around and it is operated in such a fashion that the conveyor belt as it comes around turns in an upward direction. The ice is then brought up to the top of the platform, which, as testified to by the engineer, is approximately 15 feet above the ground entrance upon which the tracks are laid.

We will show that this ice comes up to the top and then it comes out on a conveyor belt. This conveyor [69] belt extends in a westerly direction down the extent of what is known as the icing platform and all of which is, of course, 15 feet above and built as a platform in that direction. The ice, after it is brought up there, then is pulled off, taken off this conveyor and, as cars are placed along these different tracks, 12 and 13, for the purpose of icing, the ice is shifted on to the top of the car where it is broken up with a pick-like looking instrument and the cars then are iced through the top. That is essentially the proof of the icing operations without going into the other circumstances of the incidental work in it.

Our proof will show, too, that on this icing platform there are ranged two rows of overhead lights, that is, of white variety, extending down from the salt house and where the opening comes onto the icing dock from whence the ice is brought on the conveyor belt, extends on the north side all the way down in a westerly direction for a distance of approximately 1,300 feet, we will show that the distance of that dock is approximately that, and that these overhead lights are spaced at about every 50 feet and that there are 27 of them on the north side of the platform and that at irregular intervals and spotted on the south side are 27 more, making a total in all of some 54 overhead illuminating lights on this icing platform.

We will show further that there is a salt house [70] at the east end of the icing dock, and that salt

is loaded into three openings in the salt house, is brought in by freight car, and is hand-trucked across platforms laid from the freight car into the opening of the salt house. This salt is trucked into the salt house here; that there is a conveyor belt in the salt house which runs from the ground up to the top of the salt house, or rather onto the loading platform which is above the salt house, and which is the same platform as is indicated on the chart. These sacks are placed on this conveyor and, as they are wanted, they are taken up on this belt, one sack after another, up to the top, 15 feet, where they are taken off. In other words, the proof will show they are brought in from the freight cars into the salt house, then taken up on a conveyor belt up to the top of what is known as the icing platform where the further operation is taken care of.

The evidence will show that there is a great deal of switching activity in this yard at all times and that particularly is that so with reference to the icing dock and the area about it during the summer months when there is a considerable shipment of fruit and where car icing is required during the specific summer season.

There are also two lights which hang here and which can be either hung out to the side, that is, to the north or south of the ice house, which are small blue lamps [71] on the west end of the ice house, and likewise further down in this direction, down the platform in a westerly direction and probably out of sight, there is another small shed

with what appears to be a bar, we will show, across it, in which two lights of blue color are also set. So that is the proof that we will show as to the general arrangement that exists there.

We will likewise show this to you, ladies and gentlemen, that between Tracks 13 and 14—Track 14 is the track on the chart which is north of Track 13 and north of the salt house and the icing dock—that between there it has been an habitual practice to take debris and unloading material of all types in rather a declevity in the ground and carry it over and dump it here, and we will prove by the evidence that this whole area in between Tracks 13 and 14, at the time the accident occurred, prior thereto, and since, is an area generally used for throwing old material and dumping ashes and water and ice and all other types of substance, that is, between Tracks 13 and 14.

The evidence will show that on the 17th day of July, the day with which we are concerned, as I said, young Gerald Stintzi was 17 years of age. We will show that he lived with his mother at East 420 Olympic in this city, also with his younger brother who is now of the age of 14 and who was then about 12, and a young sister who is now of [72] the age of 10 and was then about the age of 8.

We will show that at this time Gerry was in his sophomore year at John Rogers High School; that he was a sterling and outstanding freshman athlete: that the economic situation of his family was such that he was depending upon an athletic scholarship to complete his college and high school edu-

cation and embark upon a medical career; that at the time in question and since he had been in the 8th grade, he had shown a greater than average ability for athletics, particularly the track events and the middle distances, the one mile, a run of that kind, and the evidence will show here that at that time and in his freshman year he was considered probably one of the most excellent prospects in this area for timber of varsity and championship caliber in those events; that he likewise was a boy who like to associate in his church activities and did considerable singing, was a very accomplished dancer, and in general was an average, normal youngster in his activities and in his associations, both in school, in athletics and otherwise.

The evidence will show that he was working for the Addison Miller Company on the day in question; that likewise at that time there were these shifts being worked by the Addison Miller Company, who were engaged in the icing operation which I have tried to explain to you as briefly as I could here; that there were about 25 to 30 men—and I [73] refer to men, I include these men and boys who were engaged in this operation in its various aspects—and that along with Gerry that evening on the particular crew doing the work that he was doing was a young fellow who was then about 16 years of age by the name of Allan Maine, who will also testify in this case; that likewise in that group was another man by the name of Joe Vallorano, and another man comprised it who is now in Canada, or who is a resident of Canada, but

there were four men engaged in the particular operation at the time of this injury sustained by Mr. Stintzi.

In addition to the general arrangement which I have pointed out to you there, at the time that the accident occurred we will show, too, ladies and gentlemen, that there was a phone system in use which was in the yardmaster's office and which connected with the Addison Miller icing dock at the top of the dock which appears here. There were interphone communications between the yardmaster's office and this office; that likewise some distance east of the salt house and the icing platform, which can be seen here on a pole, that is, a short distance to the east and on a pole, there was also mounted at the time this accident happened a loudspeaker system. This loudspeaker system was also controlled by microphone from the yardmaster's office, which appears here. We will show that the yardmaster controls and did control the general switching operations in the [74] yard and was responsible for them; that this microphone which I have described to you and which we will show was mounted on a pole in this wise, so that one of the horns was pointed in a westerly direction and mounted and facing the other way was a megaphone or horn which was directed in an easterly direction; that the phone system and the loudspeaker system were both there on the evening that this accident occurred.

These boys had been working, that is, Allan and Gerry Stintzi, I will say "this boy," had been

working about a week. He had gone to work and we will show was earning money for the purpose of his schooling and that some of the youngsters at John Rogers High School and other people did that during the summertime. The shifts were ordinarily shifts that commenced at 7 in the morning; one shift was completed at 3; the swing shift, ordinarily that commenced at 3 o'clock and went through until 11 o'clock; and then the other shift that was on at 11 o'clock, graveyard, I suppose you would call it, was completed at 7 in the morning; that at the time of the accident, three shifts were working; that Mr. Stintzi, young Stintzi, was working on the 3 to 11 shift and had gone to work that day, along with Allan Maine and these other people whom I have mentioned to you, at 3 o'clock; that they worked in the general operations and in response to the orders of their superiors around there from 3 o'clock [75] until it was time for lunch or dinner, which they took somewhere between 6:30 and 7 o'clock on the evening of the 17th of July.

After they had gone to lunch and had returned and sometime between 7:30 and 8 o'clock, possibly closer to 8 o'clock, on the 17th, the evidence will show that the foreman of the icing dock, a man by the name of Fincher, instructed young Stintzi to take himself two or three men of a crew and to go down into the part which we refer to here as the tunnel, in other words this tunnel shed or ice dock, just the shed before the ice dock, and clean out the slush ice that had accumulated. This slush ice accumulates in a sump pit which appears just about where the conveyor chain turns as it comes from a

southerly direction, and as it turns westerly and upwards in this particular house there is a sump pit which is off down to the side and the ice accumulated down in there, scrap ice, and Stintzi was directed to pick up a few men and to clean out this sump pit. The cleaning of the sump pit was done with a 5-gallon container or pail, just a big bucket.

So Stintzi and Allan Maine, his friend, Joe Valarano, and the Canadian whom I have referred to, composed the crew of four who took upon themselves the job, under the direction of the foreman, of the cleaning out of the sump pit. [76]

The evidence will show that the foreman told these boys when they took the ice out, the slush ice, to take it across the track and dump it over toward Track 14; that he gave them those specific instructions; that thereupon these boys commenced this work and it was carried on in this wise:

They would fill this 5-gallon bucket, and they will testify as to its weight, by one of the men who would fill it from the sump pit. Then it was carried on alternate occasions by Allan Maine and by Gerry Stintzi together. They would walk up the stairs of this particular pit and when they got up the stairs there was an opening, there was an opening right in this area or a door, they would come out the doorway and then they would walk a little bit east, they would go up a little bit east where there was a break, or not a break but where two freight cars were locked together. There was at that time a string of cars running in an east and west direction on Track 13 and those cars extended

up several cars in the easterly direction, while in the westerly direction there were a number of cars, or rather quite a long string of cars. The short string was in the easterly direction, I should say, up this way, and the long string was in the westerly direction, that way.

These boys would bring the ice in this slush box, or rather this can, they would go up and then they would take [77] it across the Track 13 over toward 14, in between 14, and they would dump it. On alternate occasions, Joe Vallorano would **carry it** up with one of the other boys. Their manner of getting it across the track, they would go where the two cars were coupled and the two boys would stand one on each side of the break between the cars where the coupling was, and they would take this heavy bucket and the two of them would swing it over underneath the car, after which one of the boys would slide through to the other side and it would be pulled over on this side and dumped. The boys would dump it, come through and they would carry it over, and they would dump it over between Tracks 13 and 14. They would then walk back on this side of the track and one of the boys, Allan Maine or Mr. Vallarano or Gerry Stintzi, whoever it happened to be, alternate occasions, would go through underneath the coupling, and the other boy then would shove the empty bucket back over to him on the other side and the other boy would reach for it and pull it out. Then they would both go back down into the ice house for the purpose of bringing up this slush ice.

Now on the night in question, these men had been doing this job and had probably made between 9 and 13 trips down from where they were cleaning the slush ice out of the sump up to the top, out of the door of the ice house, underneath the coupler and over where the ice was dumped on [78] alternate occasions.

At the time this occurred, Mr. Vallorano and the other man were down in the house, while Gerry Stintzi and Allan Maine were then doing this particular work of carrying the ice up in this bucket.

At about 8:15 or 8:20, the evidence will show, these two youngsters, Allan and Gerry, had come out of the ice house, out of the door of the ice house, they were carrying this 5-gallon bucket of slush ice, they came out of the ice house and turned a little bit in an easterly direction, they went across in the manner in which I have described, they went across the track right here, dumped the ice and had started back. They came back to where the track was laid, and Allan Maine went through the cars first, and when he was on the other side of the cars, Gerry Stintzi stepped across to hand the bucket to him.

Just sometime prior to that, there had been a switch movement carried on in the yard. A string of 14 freight cars had been brought on to what is known here as the "Old Main" from what would be designated and, as Mr. O'Hearne indicated, was not in the chart, would be Track 43. These cars, along with other cars, were brought onto Old Main and taken by the train and transferred in a westerly

direction to a distance somewhere west of the yard office. Then a movement was commenced in which the cars were moved [79] back, that is, the 14 to which I referred, were moved back in an easterly direction, and as they were moved back in an easterly direction, they pulled the pin or kicked, or whatever you want to call it, these 14 cars loose from the train at a point immediately in front of the yard office, and these 14 cars, our proof will show, unattended by anybody, not attended by anybody, with nobody riding the front or back and 14 in all, were allowed, as a result of the kick or of pulling the pin, to drift down in an easterly direction from the west along Old Main, as you see it, onto what is known as the lead track down to Switch 13, onto Track 13, and proceeded down in this direction from the west toward the tunnel shed, the salt house and the icing platform, these 14 cars; that at that time, the lights on this shed, some 54 of them, were all lighted and the crew had been working on that shift and the shift before, and our proof will show that there was no warning given by phone; that there was no warning given by the loudspeaker; that there was no warning given by word of mouth; that these cars were allowed to be floated down, so-called, or kicked off of Old Main up at the front of the yard office and down in the direction in which I have described which is indicated on this chart; that just at the time this boy handed the bucket over to Allan Maine and while both of them were reaching for it, there was a terrific jolting by impact of the 14 cars which [80]

had been shifted in the direction where these boys were working.

At the time of impact, the boy, Allan Maine, the edge of the car came toward him and he grasped a rung on the side of the car and hung on to it. The other boy, the proof will show, Gerry Stintzi, was in a position where he couldn't grab anything, and he was caught from the back and before he could do anything, he was thrown upon the track and the movement of the cars dragged him along for a distance of well in excess of 120 feet as a result of the impact.

The boy, Allan Maine, hung on all the time and was dragged and suffered some injuries of the face and other injuries. Gerry Stintzi was dragged along the track, as I have said, a distance of in excess of 120 feet.

The evidence will show that he was screaming at the top of his voice; that he, however, did not lose consciousness; and that Mr. Vallarano had run upstairs when he had heard this crash and that he had run up on the ice dock and looked down and saw this boy and immediately headed down through the tunnel in the direction of the Addison Miller Company for the purpose of getting an ambulance, and that he did call for help and that he did go outside and wait and direct the ambulance into the area where the boy had been injured; and that he laid there 25 to 40 minutes before the ambulance was brought and that he was then taken to the [81] hospital.

The proof will show that during the course of

the movement of the train along the tracks and over this boy, immediately after they got him to the hospital our proof will show that his right leg had been traumatically amputated at the hip joint; up at the hip joint; not here, but at the hip joint; that the proof will show that the skin of the entire right side of the abdomen and of the buttocks on the right side of the leg had been torn completely out and off, and that the lacerating wounds that had been caused by the traumatic amputation of the leg had extended over to the right and up into the rectum of the young man; that there had been, as a result of this traumatic amputation, evulsion of the right scrotum and that there had been a complete rupture of the urethra. Likewise during the course, as the evidence will show, of his being dragged down the track, he sustained what we call a comminuted fracture of the left leg at the junction of the middle and the upper third of the leg, and that likewise the contusions as a result of that injury that he sustained went up beyond the knee and into the break and then on up into the left hip joint; that likewise his arm had come in contact, that is, his right arm, with the train as it rolled along and severed the right leg at the hip and it rolled over and broke both bones of the right forearm and that he suffered a compound fracture of both [82] bones of the right forearm.

The testimony will show that he was then immediately removed to the hospital where he was immediately given two blood transfusions; that a short time after he was given the blood transfusions, the

two blood transfusions, a guillotine re-amputation of the right leg was performed. The doctor will testify of the necessity for performing a guillotine amputation in order to take out the rocks, stones, grease and debris which had been ground into the lower tissue and down into the parts of the hip where the leg had been severed.

At that time likewise, the evidence will show, the right testicle of the youngster was replaced in the scrotum and that tissue was taken away from the lower abdomen and was used to cover over the scrotum repair which the physicians made at that time. Immediately after that, he was given a third and fourth transfusion.

I might say that during the course of his stay in the hospital, which extended to a period of time of 256 days, Gerry was given 19 blood transfusions during the efforts that were made at that time to restore him.

The evidence will show that there were splints placed upon the right forearm and upon the left leg, and other treatment, of course, was administered to the wounds which he suffered, both to the extremities, which I have [83] described to you, and likewise internally.

The evidence will show that on July 23rd he was removed again to surgery where further surgery was performed by way of a further amputation and work upon the right stump, and at that time there were four pins inserted by way of a brace down the left leg, which had then developed where it didn't appear there was going to be usage, and these

pins were put in the left side of the leg and down into the bone to attempt to get union and repair of the left leg.

We will show by the testimony that again on August the 4th he was taken to surgery, after he had received further blood transfusions, for the purpose of skin grafting; that on August 13th he was taken to surgery again for further skin grafting; on September 5th again for further skin grafting, and that skin grafting was performed as to the entire area of the traumatically-amputated right leg from the hip on down to the area just next to the rectum and below the scrotum; that likewise this skin grafting was carried on over the entire section of his stump which had been torn and lacerated by virtue of the accident, and patches were also placed upon the right side of his body, and we will show you the results of those skin grafts with slides which we have and which will be shown here to you for the purpose of showing just exactly what these injuries consisted of. [84]

The evidence will show furthermore that on October 7th this young man was again taken back to surgery, and at the time he was taken back on the 7th, the evidence will show that in the repair of the right forearm and in its union, there had been a growth of a bridge of bone in between the two places where it had been broken, and it was necessary to reopen that entire arm by surgery and take out this bone bridge before it was closed and repaired again.

On February 24th, surgery was again performed

with regard to both the leg and the plastic work, and the evidence will show that he has been in attendance for this injury since that time.

It will be shown that a prosthetic device by way of an artificial limb was specially made to see if this young man could possibly use an artificial limb. Our evidence will show that for months this thing has been fashioned and tried, he has tried to use it, but that to this day he cannot, and the doctor will express his opinion on this boy's ability to ever wear an artificial limb because of the type of amputation which he has sustained.

We will show furthermore that this young man since this accident has done everything that he possibly could to try to rebuild his physical being; that he has gone to the YMCA where he has tried to swim, where he has lifted dumb bells and one thing and another to try and develop and [85] bring back his body; that he is unable, however, and has had to cease that because of the injury to the right arm which has not responded and because of the fact that there is a complete deadness of the use of two of his fingers and of the use of the wrist and in flexion and extension of his arm which he has not been able to develop; that furthermore, as a result partly of the injury, our evidence will show, and partly the attempt to wear this leg, there has now developed a further discharge in the stump of the leg and that there has been further infection as of this date which will require a considerable amount of work, our evidence will show.

The testimony furthermore will indicate that there

is a doctor's bill at present of approximately \$3,000; that the hospital charges are approximately \$7,000, at least somewhere in the neighborhood of \$6,678; that special nurses who were in attendance on Gerry at the time of this injury and when he was brought to the hospital, the bills of those special nurses will be in the neighborhood of \$2,165; that the prosthetic devices, the brace and the leg and the other things which he has secured in an attempt to rehabilitate and walk, are of a price of somewhere in the neighborhood of \$670; and that there is a total medical expense thus far incurred by Gerry Stintzi in a total of somewhere between \$12,500 and \$13,000 as of now.

Our evidence will further show that at this time [86] this young man is unable to use another leg; he is constantly confined to crutches; he can't work and can't get a job, though he has tried to. He has lost a great deal of the use of the right arm, deficiency of the left leg, and, of course, the right leg severed completely. He is unable to do the things about the home, his own toilet necessities that ordinarily are required of all of us; that he must be assisted in those by his mother as to taking a bath; and that he still suffers by virtue of the injury to the urethra in a burning sensation that occurs every time he is compelled to urinate or do anything that is required; that these things are constant with him.

Our evidence will show that during the period of his stay in the hospital, he suffered excruciating pain and that that has not ceased, and the testimony here will indicate the permanent and complete dis-

ability and the loss of the expectancy of any earnings or of his desire to be a physician or other professional man after these witnesses have testified.

That, ladies, and gentlemen, will be the evidence that we expect to prove to you by the witnesses whom we intend to call in this case.

The Court: Do you reserve your statement?

Mr. Cashatt: With your Honor's permission, I would like to give it at this time. [87]

The Court: Yes, all right.

Opening Statement

By Mr. Cashatt:

If your Honor please, ladies and gentlemen of the jury: I have decided to give my opening statement at this time in order that you would be somewhat acquainted with the position of the defendant in this case as the witnesses are called and the case proceeds.

Our evidence, ladies and gentlemen, will show that the Northern Pacific yards at Parkwater or Yardley are a large operation. It is one of the largest switching yards on the Northern Pacific system, possibly the largest between St. Paul and the Coast.

Our evidence will show that on these tracks, as are shown and designated on Defendant's Exhibit No. 1 and over the other tracks which are out there—I might say this area, our evidence will show, runs about one mile from Havana Street to Fancher Way and approximately a half a mile north and south—that area is completely covered with tracks, numerous tracks, dozens of tracks. We will have an aerial

picture to give you a better picture, an idea of just what that situation is out there.

Our evidence will further show that between 50 and 60,000 boxcars go through these particular yards in a [88] period of one month; that is, between 1,500 and 2,000 boxcars come and go through that yard every day; that, in addition, in order to handle those cars, to bring them in and to take them out of that yard, it requires several switches and movements of these particular cars in order to handle the same. Our evidence will show on that point that there are between 5 and 6,000 different switches made in that yard every 24 hours; that it is a beehive of activity; and that when you go to those yards, when you have been there five minutes, that anyone being there realizes one thing: you realize that activity, you hear the constant clanging of cars, the constant noise and the movement, and so on, that is taking place there.

The evidence we will produce will definitely show what the relationship of Addison Miller was with the Northern Pacific Railway. It will show that the ice plant at the place where the ice is manufactured and the tunnel and the dock were constructed during the period in the 1920's by the Addison Miller Company; that they operated it until January 1, 1937, as the owner of that particular ice plant and of that tunnel and the loading dock. We will show the contract relationship between Addison Miller and Northern Pacific since January 1, 1937 up until this accident occurred.

Our evidence will show that in 1937 the Northern Pacific took over the ice dock, the tunnel and the ice

plant, [89] and entered into a contract with Addison Miller as an independent contractor, agreeing that they would purchase ice for their cars from Addison Miller and would pay them a certain amount for this merchandise they were using, and that Addison Miller would manufacture the ice and convey it to the ice dock, put it in the cars, and so on, as an independent contractor; that they would hire their own employees, supervise their own employees, pay their own employees, and that they would be separate and distinct in every respect from the Northern Pacific Railway.

Further, we will show that the contract between Northern Pacific and Addison Miller covered the ice plant, the tunnel which we have referred to here, and the ice dock itself. We will further show that Track No. 13, which runs on the north side of the ice dock, and Track No. 12, which runs on the south side of the ice dock, were general purpose tracks for any and all use to which the Northern Pacific Railway decided that they should be put; that they were not exclusive ice tracks. Our evidence will show that through the years those tracks have been used for all purposes, just as any other of the switching tracks located in the Northern Pacific yards at Yardley or Parkwater, Washington.

Further, our evidence will show that the Addison Miller employees came to work through the ice plant, which is located on Sharp Avenue and which has a parking space [90] around it and which is not actually in the yard area itself; that through this tunnel there was this conveyor and also a walkway

by which the Addison Miller employees could go from the ice plant to the ice dock; that in crossing from the ice plant to the ice dock that the Addison Miller employees did not have to go or set foot on a single rail in that yard; and, further, our evidence will show that in the work which Addison Miller had contracted to do for Northern Pacific Railway, that one of the functions was the icing of cars and that that work was done up on a level as you have heard here, that this platform was about 15 feet above the ground; that that icing operation was carried on up on a level with this platform 15 feet above the ground.

Further, our evidence will show that there was no necessity at any time for any Addison Miller employee to be crossing Track No. 13 or any other track located in the Northern Pacific yards at Yardley.

The evidence will show just how this yard is operated out there. It will show what the communication system is between the Northern Pacific Railway-Addison Miller and vice versa. I will briefly outline a few of the important details, I think, on that particular phase.

It will show, ladies and gentlemen, that this yard office, that here the man in charge is the yardmaster, the Northern Pacific employee, the man that has charge and under [91] whose supervision and direction the movement of all of the cars in this particular yard goes through. It will show that also located at the yard office, that the Northern Pacific has what is known as an ice foreman, a man who is

notified in advance by telegram when ice cars or fruit trains are going to arrive in the Northern Pacific yards. We will show the instructions he receives as to what cars should be sent for icing, and so on and so forth, and, further, that what his procedure is, after being notified that a fruit train or even an individual car or two cars would arrive at the yard, that he would immediately contact the Addison Miller foreman, either by the phone between the yard office and the ice dock down here or by the regular Bell telephone system between the yard office and the Addison Miller ice plant, and that they would be notified at the time that cars requiring icing would arrive and when they would be put on either Track 12 or 13 for the icing operation. Further, that when that information arrived in the Northern Pacific office, that the yardmaster, through his series of helpers and other persons in different capacities there, would also know immediately of the time cars were to arrive and fruit trains were to arrive, and that when they did arrive, it was the yardmaster himself who would give the specific instruction to the switch crew as to what to do with the fruit train or the cars to be iced, say if there were one or two cars, and that then he [92] would give a hard list or an instruction to the switch crew and they would place the cars on the track.

Further, that the yardmaster knew at all times which cars were on Tracks 12 and 13. The one on 13, of course, is the one that runs north of the ice dock, and Track 12 is the track that runs south of the ice dock; that within his knowledge, our evi-

dence will show, that on this particular date he knew what cars were on those tracks at all times through that day. Further, that in addition to the communications between the yard office and the ice dock, that when a car was in for icing or if a train was in for icing when an actual icing operation was to be carried on, that blue lights located on the west end of the salt house would be put in place and would be illuminated, the lights would be turned on by the Addison Miller foreman, in order that there would be an additional precaution and a protection for anyone who was actually engaged in icing operations.

Further, our evidence, ladies and gentlemen, will show that on July 17, 1952, the day of this accident, at approximately 4 p.m. in the afternoon a fruit train consisting of 55 cars arrived at Yardley, Washington; that that fruit train was divided, part of the cars put on Track 12, part of the cars put on Track 13; that when that train arrived, the ice foreman notified the foreman of the Addison Miller of its coming, the yardmaster instructed the switch [93] crew to place the cars on 12 and 13, and that that icing operation was completed at 6:10 p.m.

Further, our evidence will show that after that icing operation was completed, the Addison Miller crew left the dock, the ice dock, went through the tunnel and went over to the ice plant where there are quarters set up for them to eat their lunches or meals while they are working, and during this period between 6:10 and 7 o'clock, that that fruit train was pulled off of Tracks 12 and 13, hooked

back together, and it left for the East at 7 p.m. that evening; that when the fruit train was taken off Tracks 12 and 13, it left Tracks 12 and 13 clear and there were no cars of any type on either one of those tracks.

Our evidence will then show that shortly before 8 o'clock, the switch train from Armour which makes what is called in railroad terms the "meat run," that is, the switch crew, the evidence will show, that takes cars of livestock to Armour's and Carsten's in the evening and returns empty stock cars from Armour's and Carsten's, it will show that approximately at 8 o'clock that evening that 9 C.B. & Q. single-deck empty stock cars were brought to the area where the yard office is located and the switchman was instructed by the yardmaster to put those 9 empty stock cars on Track 13 and that order was followed out. The proof will show that at the time those 9 cars were put on Track 13, that [94] there were no other cars on Track 13; that there had been nothing there between the time the fruit train was taken off and when these 9 empty cattle cars were put on Track 13 just before 8 o'clock; further, that the Addison Miller crew completed their lunch period and returned to the ice dock; that they were under the supervision of a man by the name of Mr. Fincher, who I believe was the foreman in charge of the crew, the Addison Miller crew that night, and that when the crew and Mr. Fincher arrived at the ice dock, that at that time five members of the crew, Mr. Stintzi, Mr. Maine, Mr. Tarnowski, Mr. Vallarano and Mr. Johnson,

were designated by Mr. Fincher to remove this chipped ice from this area which is designated on Defendant's Exhibit No. 1 where the conveyor chain makes the turn from going north and goes to the east.

Our evidence will show that at that particular location below this conveyor chain, that sometimes chips of ice come off and accumulate at that area; that the area where they accumulate is the same general area or level as what the tunnel itself is at this location, and that while this crew went down when they came back, they were carrying out this operation.

I believe the evidence will show that Mr. Fincher said to dump that ice across Track 13; that the Stintzi boy and the Maine boy were carrying this bucketful of chipped ice which the other members of this particular crew had put in the [95] buckets inside of the area there, were carrying that out through the door, and that at that time these 9 C. B. & Q. cattle cars, empty cattle cars, were sitting on the track. The evidence will show that at that time seven cars were to the west of the location where the boys were coming out of the door and that there was a car directly in front of them and possibly another to the east of the location where they were coming out with this bucket of slush ice, and that in carrying out the operation, just as Mr. Etter has told you, I will not go into detail on that, he said that that they were at that time passing this bucket back and forth between where two of the stock cars came together under

the couplings of those cars, and that while carrying out the operation at that location, crawling under the couplings of these cars, the yardmaster up at the location here as shown on Defendant's Exhibit No. 1 gave an instruction to Switch Foreman Prophet to pick up 14 cars on Track No. 43, which would be up in this area, and bring the cars down and switch them in on Track 13.

The evidence will show how that switch crew went over, picked up those cars, what they could see of the rest of the yard while they did so, how they went back to the main, which was necessary to come to in order to get on to the proper track to switch those on No. 13.

Our evidence will show at the time the yardmaster [96] gave that instruction to that switch crew, that he knew that there were only 9 empty stock cars sitting on Track 13; that there were no refrigerator cars on Track 13 upon which any Addison Miller man could be doing any work at that time; that there were no other cars on Track 13 which anyone or any employee of Addison Miller would be loading on anything; that Track 13 at that time was being used by the Northern Pacific Railroad for the making up of a train which was going to leave and go East; that they were going to use Track 13 to make up this train, which had been their general purpose and custom ever since they have operated this yard at Yardley or Parkwater, Washington, to use Track 13 for any purpose whatsoever at any time; that it was not an exclusive ice track; and, further, that at that time he had

received no information, no phone call, from the foreman or anyone in charge, anyone whatsoever, at Addison Miller and at the dock itself, nor had he received any phone call or any notification whatsoever from any Addison Miller foreman or employee from the ice plant that any Addison Miller employee was engaged in any work on, about or around any tracks of the Northern Pacific Railroad, particularly Track No. 13.

The evidence and proof will show that the switch crew, when they came back up from picking up the 14 cars that they had been instructed to put in on Track 13, as they came back they lined up, the Switch Foreman Prophet lined up [97] Switch No. 13, opened the switch in order that the cars as they went to the west, they could be switched back on to Track 13 to the east, and at that time that he left a switchman by the name of Craig located at Track 13, and at that time neither the switch foreman, switchman or the other man who subsequently uncoupled the 14 cars in question, saw any blue lights whatsoever on the ice dock indicating or giving any reason to anticipate that anyone would be on or about the tracks located in the area of the icing dock, let alone that anyone would be crawling under the couplings of the cars at that location; that as the movement was carried out, the 14 cars were uncoupled in the area up around here, that they were sent on down the main and went across the Switch 13 and proceeded on down Track 13.

Our evidence will show that the operation of

shunting of cars, the movement of cars in that particular fashion, is an ordinary and customary practice that occurs and takes place in these switch yards thousands of times every day. Our evidence will show that no one could be in those yards for a period of over 5, 10, 15 minutes without observing that situation on various tracks and locations in those yards.

Further, ladies and gentlemen, our evidence will show that at the time that this accident occurred, there were no facts, no information, which the Northern Pacific man in [98] charge had or could have had which would have caused him any reason to anticipate that anyone was crawling beneath any cars in the area of this ice dock. Further, the evidence in general will show that at no time had the Northern Pacific Railroad been advised or had ever known that anyone crawled between standing freight cars at this location, and the evidence will further show that at no time had the Northern Pacific Railroad given any permission, either express or otherwise, to use any area other than what was given them under the contract which began and went into effect on July 1, 1937.

The evidence will further show that the area between Track 13 and Track 14 was an area that was used for dumping, the area along there; that the Northern Pacific Railroad would bring in dirty cars of all types and that they would clean the refuse from the cars, dump it in this particular area and burn the same. The evidence will further show that the crew taking out this slush or chipped

ice had ample space to dump that on the south side of Track 13 without ever setting forth one foot or ever touching Track 13 itself. It will show, ladies and gentlemen, to the west that it was a very short distance, as is shown on the Defendant's Exhibit No. 1, to an area where the ice and slush ice could have been dumped; that in this operation of cleaning out this pit sometimes doesn't occur once a month, once in two months. In [99] some seasons, the busier seasons, the evidence will show, possibly it occurs twice a month. The evidence will show that it is not a daily activity or something that is done constantly. It will show the amount that was taken out; that the small amount taken out could have been dumped south of Track 13, either to the west between this building designated as the tunnel shed here and the coal shed or over to the west of that particular area; or that by going to the east, that they would come under this icing platform which is 15 feet in the air, set up on pilings, and for a distance of 300 feet or more to the east there is nothing under that platform.

Now, ladies and gentlemen, we say, and say in all sincerity, that the Stintzi boy did sustain a serious injury. Everyone connected with the Northern Pacific is sorry that accident occurred, sorry that injury occurred.

As I say, ladies and gentlemen, when we have produced the witnesses that will testify to the facts which I have briefly related to you at this time, I believe that we can come before you at that time and honestly say and show you that this accident

was not caused by any negligence of the Northern Pacific Railroad.

Thank you very much.

The Court: We will take a recess before proceeding. Court will recess for 10 minutes. [100]

(Whereupon, a short recess was taken.)

The Court: All right, proceed.

Mr. Etter: Call Gerry Stintzi.

GERALD STINTZI

called and sworn as a witness on his own behalf, testified as follows:

Direct Examination

Q. (By Mr. Etter): You are Gerald Stintzi?

A. Yes.

Q. Call you Gerry, don't they? A. Yes.

Q. Everyone calls you Gerry. Where do you live, Gerald? A. 420 East Olympic.

Q. Another thing I am going to ask you to do is speak out good and loud, because the acoustics are a little difficult in here and all these people on the jury, besides counsel and the Judge, have to hear what you have to say. A. Yes.

Q. You live at East 420 Olympic, Gerry?

A. That is correct.

Q. And who else lives there with you in your family? [101]

A. My mother and my brother and little sister.

Q. And your brother, how old is your brother?

A. 14.

Q. And your sister? A. 10.

(Testimony of Gerald Stintzi.)

Q. And how old are you now, Gerry?

A. 19.

Q. And when this accident occurred on the 17th of July of '52, you were 17?

A. That is correct.

Q. You were 17 then. Now how long have you lived here in Spokane, Gerald?

A. Oh, 15, 17 years, around there.

Q. Around there. And you went to grade school here? A. Yes.

Q. Where did you go to grade school?

A. I started at Opportunity, Dishman, then I went to St. Xavier's and then Hamilton.

Q. And then Hamilton? A. Yes.

Q. You finished the 8th grade at Hamilton, did you? A. That is correct.

Q. And entered Rogers High School?

A. That is correct.

Q. And what year were you in at the time this accident [102] occurred?

A. I was a sophomore. It was in 1952.

Q. You were a sophomore?

A. That is correct.

Q. Did you participate, can you tell us, in athletics when you were in grade school, Gerry?

A. Yes.

Q. And when did you become most interested in athletic work?

A. All my life I have been.

Q. When in grade school, however?

(Testimony of Gerald Stintzi.)

A. Well, I started to really practice in the 7th grade.

Q. And did you continue that, then, through the 8th grade? A. Yes.

Q. What particular sports, Gerry, did you like and were you quite proficient in?

A. Track and football.

Q. Track and football. And in track, what was it that you did?

A. I ran the mile and did some broad jumping, and when I was in grade school I ran relay and sprints.

Q. Relay and sprints. And you were doing that, you were putting emphasis, were you, on that as a grade school student?

A. Yes, my most emphasis was on distance running. [103]

Q. Did you continue that as a freshman when you got to Rogers High School? A. Oh, yes.

Q. Both in your freshman and your sophomore years? A. Oh, yes.

Q. Prior to the time that this accident occurred, Gerald, had you worked for Addison Miller?

A. Yes.

Q. And what type of work had you done?

A. I worked in the icing house, chipping ice, where they make it, and I worked up on the dock with salting cars and icing cars, and then down below taking salt from the cars into the salt pit.

Q. I see. And you started to work there, did you, in this year, that is, in '52? Can you tell us about

(Testimony of Gerald Stintzi.)

when it was you started working there before the accident occurred on the 17th?

A. It was approximately five days before I got hurt.

Q. Approximately five days before you got hurt?

A. Yes.

Q. Now you are acquainted, Gerry, with Allan Maine, are you? A. Oh, yes.

Q. Is he a schoolmate of yours at Rogers?

A. Yes. [104]

Q. And he was at the time that you were working for Addison Miller? A. Yes.

Q. Is that correct. And prior to the 17th of July while you were working for Addison Miller, had you done these various jobs that you have told us about; in other words, chipped ice and worked in the salt shed and one thing and another?

A. I did everything I mentioned except work in the ice house where they made the ice.

Q. You did everything except work in the ice house? A. Yes.

Q. And those five days, I assume that you had been doing that type of work, is that so?

A. That is so.

Q. What shifts were being used there at Addison Miller, Gerald, on the 17th?

A. There was the day shift and the night shift and the swing shift.

Q. Now you mean by the day shift which shift?

A. That was—oh, let's see—well, it was 8 hours before 3 o'clock, it was early in the morning.

(Testimony of Gerald Stintzi.)

Q. In other words, it was 7 to 3?

A. Yes, 7 to 3 and 3 to 11 and from 11 until the morning shift again. [105]

Q. Can't hear back here?

A. Okay. It was from 8 to 11.

Q. 3 to 11?

A. Or 3 to 11, then from 11 to the morning shift, and then from the morning shift——

Q. On again to the afternoon or swing shift at 3? A. That is correct.

Q. In other words, there were three shifts around the clock? A. That is correct.

Q. On the night of the 17th, the shift that you were working was which one? A. The swing.

Q. The swing shift? A. That is correct.

Q. And you had gone to work that day at what time? A. 3 o'clock.

Q. At 3 o'clock? A. Correct.

Q. All right, when you came to work at 3 o'clock, can you tell us about how many men were working on that crew, that is, generally on that shift, I should say, for Addison Miller in that area?

A. Oh, there was quite a few, maybe 20, 25. There was quite a few, I never counted them.

Q. Would you estimate it somewhere between 20 and 25? [106] A. Approximately.

Q. Approximately, I mean, I am not trying to get it exact. But that is about the size of the crew?

A. That is.

Q. And at 3 o'clock, starting at 3 o'clock, can

(Testimony of Gerald Stintzi.)

you tell us, were you directed to do any particular type of work when you first came on shift?

A. No, we usually iced cars, go up to the dock and chop down the ice first so we could bring the ice on to these pulleys, then put the ice in and chop it down, then close the lids.

Q. I see. Now during the course of the fore part of this trial you saw this large chart that was set up here, Gerry? A. I did.

Q. And you were referring to the ice dock, is that the ice dock that is indicated on that chart?

A. Yes, with the lights, the one that is up in the air.

Q. With the lights? A. Yes.

Q. You say that you had been doing the general duties associated with icing cars, is that correct?

A. That is correct.

Q. Up until about what time?

A. From 3 until 11. Sometimes we worked over-time if the [107] crew had had more cars than it could handle.

Q. What I am getting at now, on the 17th you started to work on cars at 3 o'clock, is that right?

A. Yes, we worked on cars.

Q. And how long did you work before you went to lunch, do you recall?

A. No, I don't recall.

Q. Do you recall what time it was that you took lunch that night?

A. We, we just finished. There is all different intervals. We just finish, when we have our work

(Testimony of Gerald Stintzi.)

done, a car that comes in, a string of boxcars, and then we go to lunch.

Q. I see. Do you recall, have you any idea, about approximately what time it was that night?

A. No.

Q. In other words, between 3 and 7, what time it was, somewhere between that that you went to lunch?

A. No, I wasn't paying any attention to time.

Q. You didn't pay much attention to the time. Who did you have lunch with that night?

A. Pardon?

Q. Did you have lunch with one of the men on your crew or any of the men on your crew that night?

A. Allan Maine and I, we had lunch.

Q. You and Allan Maine had lunch together?

A. Yes.

Q. I see. Do you know "Idaho" Davis?

A. Yes.

Q. Was "Idaho" working on the crew that night? A. Yes.

Q. I mean, he was in the group that was working, the 20 or 25 that you have referred to?

A. Yes.

Q. And Joe Vallarano, do you also know Joe?

A. Not personally but just out at the job.

Q. But you know who he is?

A. Oh, yes.

Q. And was he working in that crew that night with you? A. Yes.

(Testimony of Gerald Stintzi.)

Q. He was. But you had lunch, you say, with Allan Maine?

A. That is correct, with some others.

Q. Do you recall about what time it was that you got back to the Addison Miller dock or, that is, the building where they were doing the icing, where they bring the ice up? Do you remember what time it was you got back there after you had lunch?

A. No, I don't, I didn't pay any attention to time.

Q. All right, will you tell us what occurred after you got back from lunch? Where did you go?

A. Well, after lunch we might have iced some cars, which I [109] don't remember, it is quite awhile back.

Q. You don't remember that?

A. No, we might have.

Q. All right.

A. And then from there we were up on the dock and Fincher started choosing——

Q. Just a minute. You were up on the dock?

A. Yes, that is correct.

Q. You mean you were up on the raised dock that has been described as being about 15 feet above the level of the tracks? A. That is correct.

Q. All right, you go ahead now, tell us.

A. And then we were standing around and then Fincher——

Q. Who is Mr. Fincher?

A. The foreman.

(Testimony of Gerald Stintzi.)

Q. What foreman? Whose foreman?

A. Our foreman.

Q. I mean, who employs him?

A. Addison Miller, I think.

Q. All right, now, you tell us what happened then.

A. He told me to choose a crew to go down and clean the ice slush from underneath the pulley belts, under the belts.

Q. All right, what did you do then? [110]

A. Then I started choosing my crew, and then he said to go down, take the slush——

Mr. Cashatt: I object to any conversations between the foreman of Addison Miller and this witness, your Honor.

Mr. Etter: I am asking for the instructions he was given.

The Court: I think he is entitled to show instructions he had. I will overrule the objection to that extent.

Q. (By Mr. Etter): Gerry, if it is conversation, don't talk about that, but did Mr. Fincher, the foreman, give you some instructions?

A. Yes.

Q. What were they?

A. To go down, take the slush out and go across the track and empty it.

Q. And empty it? A. That is correct.

Q. And did he tell just you to do that?

A. Well, in general the crew that he chose.

Q. I see. And who composed that crew?

(Testimony of Gerald Stintzi.)

A. It was Vallarano, Al Maine, me, and there—I can't remember the other parts of the crew.

Q. There was one other man from Canada, wasn't there?

A. I believe so, I'm not really sure.

Q. But there were you and Al Maine and Joe Vallarano? [111]

A. That is correct.

Q. Do you remember this fellow by the name of Tarnaski that was from Canada?

A. I may have said a couple of words to him, but I really don't know him.

Q. No, but I mean do you remember him as being in the crew?

A. No, I don't.

Q. John Tarnaski, a fellow from Canada?

A. No, I don't.

Q. All right, then, what did you fellows do, that is, you and Al Maine and Joe Vallarano and whoever might have been with you? What did you do?

A. We went downstairs and then in a discussion we chose parts where we would work.

Q. All right. What did you start doing first?

A. We took the bucket, Al Maine and me we took the bucket, and we waited for them to fill it up down in the slush pit and then Vallarano would hand it to Al and me, and then from there——

The Court: I have no way of stopping these planes. I suppose we just better wait until they fly over.

All right, you may proceed.

Q. (By Mr. Etter): Now when you were told

(Testimony of Gerald Stintzi.)

to dump this ice across the track, what track was that, was it designated? [112]

A. Well, there is only one track alongside there. We didn't know the numbers or anything.

Q. I mean to the north or south?

A. To the north.

Q. To the north. And you were told to take it across that track, is that correct?

A. That is correct.

Q. Would that be Track 13 that was pointed out as being the first track north here (indicating on Exhibit 1)?

A. That is correct.

Q. The one north of the ice house on Exhibit 1 on which the red line is drawn, the first one north of the ice house?

A. Yes.

Q. Beg your pardon?

A. Yes.

Q. Yes. And you say that these buckets were filled up with this slush ice?

A. That is correct.

Q. All right, what sized bucket was that, Gerry?

A. I couldn't give the measurement, but it was big enough for both Al and me to really have trouble carrying it.

Q. You say it was filled up with slush and then you took ahold of it, is that it?

A. That is correct.

Q. All right, then what did you do with it, you and Al? [113]

A. Al and me took it side by side, we carried it up through this flight of stairs to the outside, and then we walked—let's see—a little to the west

(Testimony of Gerald Stintzi.)

and we came to the couplings, and then from there I went under the couplings and he gave it a boost to the middle of the coupling, and then from there I took it with a big boost maybe one or two steps and dumped it.

Q. Let me ask you this: how far to the west was the first opening by the coupling where you went through, do you recall?

A. I wouldn't give any exact, but around 10 feet.

Q. 10 feet or so. That would be west of the door that you came out, wouldn't it?

A. Yes.

Q. Toward the yardmaster's office?

A. Yes.

Q. Now those cars, those railroad cars, are about 40 feet long, generally, aren't they?

A. I wouldn't know.

Q. I know, but that was your closest opening, I gather?

A. Oh, yes.

Q. I see.

The Clerk: Your Honor, I have marked Plaintiff's 2 through 15 for identification.

Q. (By Mr. Etter): Now, Gerald, for the purpose of [114] identification, I am going to ask you if you recognize the Plaintiff's Exhibit No. 2 for identification?

A. That looks like the tunnel, the tunnel.

Q. The tunnel? Which tunnel is that?

A. That is leading out to the—well, what would they call it?

(Testimony of Gerald Stintzi.)

Q. The ice-making house? A. Yes.

Q. I see. Is that the tunnel that was described on the Defendant's Exhibit 1 as coming over into the Addison Miller shack? A. Yes.

Q. And Plaintiff's No. 3, you recognize that?
A. Yes.

Q. And what is that?

A. That is going out to the big dock, the high dock, from where they make ice.

Q. I see. Is it another picture, a close-up, of what is indicated in Identification 2?

A. Yes, it is the same tunnel.

Q. All right. And that is the tunnel that is described on the chart, is it, Gerry, as coming over from the ice house, which appears at the southern part of the chart, and goes across on to the ice house? A. That is correct. [115]

Q. Now showing you the Plaintiff's Exhibit No. 4 for identification, Gerald, can you tell me what that No. 4 is?

A. That is just going right up to the high dock up there where we ice cars, that is going right up there.

Q. And what is shown besides just the stairs and going up there? Is the chain there?

A. Yes, and the slush there.

Q. I see, all right. And Plaintiff's 5 for identification, Gerald?

A. That is where we took the slush from, that is of the slush pit.

Q. Is that the sump? A. Yes.

(Testimony of Gerald Stintzi.)

Q. So-called. I might ask you, is that also shown in Identification 4? A. Yes.

Q. I see. And is a close-up?

A. Yes.

Q. Plaintiff's No. 6 for identification?

A. That is going up to the big dock and the chain where we took the ice from.

Q. I see. Is that a continuation and a view up above of the sump which is in 5 that you just identified? A. Yes, that is correct.

Q. You speak right up, don't whisper to me up here. See, [116] they want to hear you back here, Gerry.

No. 7 for identification, can you tell us what that is?

A. That is where we came right out to go across the track from where we were taking slush.

Q. I mean, is that the opening to the room where you were getting the slush?

A. That is correct.

Q. I see. That is No. 7. Now No. 8?

A. That is the house we come right out of, right up after we get to the top of the dock.

Q. I see.

A. Where we iced cars.

Q. I see. That is as you get to the top of the dock, is that correct? A. Yes.

Q. Is that looking west?

A. That is looking west.

Q. That is looking west. All right. And No. 9 for identification?

(Testimony of Gerald Stintzi.)

A. That is looking east on the docks where we took the ice and put it on to boxcars.

Q. I see. Now as to Identification No. 8, is No. 9 a view from that doorway looking east?

A. That is correct. [117]

Q. That is correct. Along the dock or the ice dock? A. That is correct.

Q. All right. Now 10, Gerald, for identification, can you tell me what that is?

A. That is the rail we went across, and that picture there, we are looking west—I mean, looking east.

Q. All right, along the dock? A. Yes.

Q. All right. No. 11 for identification?

A. That is looking east.

Q. That is looking east?

A. Yes, that is another picture of the rail.

Q. And it is a similar picture to No. 10, is it not? A. That is correct.

Q. Taken from a shorter distance back?

A. Correct.

Q. Along the same direction, east?

A. Correct.

Q. No, 12 for identification, Gerald?

A. That is the same rail, looking west.

Q. This is looking west where the others were east, is that correct? A. That is correct.

Q. Looking west, which on the Defendant's exhibit would be down toward the yardmaster's office where the switching [118] movements are made?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Is that correct? A. That is correct.

Q. All right. And No. 13?

A. That is looking west, the same rail looking west.

Q. It is looking west, another view of the same scene as is indicated in the Identification No. 12?

A. That is correct.

Q. That I just handed you?

A. That is correct.

Q. Now No. 14 for identification?

A. That is looking east on the same rail that we went across.

Q. That is looking east, is it not?

A. That is correct.

Q. Down toward this particular shed that appears in 12 and 13? A. That is correct.

Q. And No. 15?

A. That is looking east, that is the same rail, that is a long view.

Q. That is also looking east? A. Yes.

Q. Is that correct? [119]

A. That is correct.

Q. All right. Now, No. 16 for identification, Gerald?

A. That is a picture where we came out of and the rail next to it, the north rail.

Q. I see. Is that a picture of the dock and the salt house? A. That is correct.

Q. In two sections, is it not?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Two sections put together. Do you recognize it? A. Yes.

Mr. Cashatt: Your Honor, may we take a minute to look at these pictures?

The Court: All right.

Mr. Cashatt: May I ask, counsel, when these pictures were taken?

Mr. MacGillivray: I think probably in August, sometime in August, 1952.

Mr. Cashatt: '52.

Mr. MacGillivray: As close as I can get it, about August the 9th, approximately August 9, 1952, Exhibits 2 to 15 were taken. Exhibit 16 was taken——

Mr. Etter: Last Friday night.

Mr. MacGillivray: Thursday night.

Mr. Cashatt: No objections, your Honor, to Exhibits [120] 2 to 15. Those were the ones that were offered.

The Court: Yes. They will be admitted, then. I am not sure whether you offered 16 or not.

Mr. Etter: Yes, I am offering 16, too, at this time, your Honor. That was taken last Thursday.

(Whereupon, the said photographs were admitted in evidence as Plaintiff's Exhibits 2 to 15, inclusive.)

Q. (By Mr. Etter): As to 16, Gerald, you will note that it is broken in the middle there. There are two pictures here pasted together, are there not, with a piece of scotch tape?

A. That is correct.

Q. Now the designated east and west, the track

(Testimony of Gerald Stintzi.)

appears to be going off at about a 30 degree angle or so there and there is a corner on this building. Now is there a corner on the building or not?

A. No.

Q. This building is straight through, is it not?

A. That is correct.

Q. And if it is folded, the west part indicates half of the building, isn't that correct? [121]

A. That is correct.

Q. And if you turn it over this way, as designated by the east, it indicates the other half?

A. That is correct.

Q. And, actually, the railroad track outside of it would have to be viewed as a straight-line track, rather than showing the crook in it by reason of having to take half of the picture with one focus and half of the picture with the other focus?

A. That is correct.

Q. In other words, the actual representation of it in order to get it would have to be by folding it and looking at one half one time and turning it over and looking at the other half to get the continuation of the dock?

A. That is correct.

Q. That is correct. There are no corners to the building, it is all one complete building along the same line of track?

A. It is straight.

Q. It is straight.

Mr. Etter: Any other questions, Leo?

Mr. Cashatt: No objection.

The Court: Well, with that explanation, it will be admitted. [122]

(Testimony of Gerald Stintzi.)

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 16.)

Q. (By Mr. Etter): Now, Gerald, at the time when you were icing a car, when you iced a car, will you tell us the operation of icing a car from the time the ice comes along that chain belt until it is taken upstairs and put in the top of the freight car? Just tell us in brief how that is done.

A. The ice comes along in a great big chunk, along this belt affair, chain affair, and somebody is elected to push it off on to the side at certain points where it should be iced. Then it is chopped and then——

Q. Well, now, just a moment. First, it comes along on this chain belt, does it not?

A. That is correct.

Q. All right. Tell me, does the chain belt take it in an upward direction to the top of the ice house? A. That is correct.

Q. On to the ice dock?

A. That is correct.

Q. All right, and then what happens?

A. Then it goes straight along the top of the dock. [123]

Q. All right.

A. And it carries the ice and, like I said, then at certain parts they push it off the chain to where we are going to ice.

Q. All right, they pull it off the chain on to the dock? A. That is correct.

(Testimony of Gerald Stintzi.)

Q. All right, they get it on the dock, what do they do then?

A. Then they cut it in half, then we give it a great big shove, we have the lids open to the boxcars, and it is chopped down first.

Q. Do you slide it across a plank or a runway from the dock on to the top of the boxcar?

A. Yes, there is a little plank they carry.

Q. All right, and it is slid across on to the top of the boxcar?

A. That is correct.

Q. All right, when it gets to the top of one of the boxcars, then there are men that work on top of the boxcars?

A. That is correct.

Mr. Cashatt: Just a minute. I believe that these are refrigerator cars.

Mr. Etter: Yes, refrigerator cars, that's correct.

Q. They slide it across the top of these refrigerator cars and there are men on top of them, is that correct? [124]

A. That is correct.

Q. All right, when it gets over there, what happens to it and what is done to it, that is, this piece of ice?

A. Then there is a person over the top of the hole where it goes down into the car, he takes his pick and pushes it down in there and chop it up fine and then puts salt on top, throws a lid on top, and then goes to the next car.

Q. All right, now, this chopping, how is that done?

A. Upward and downward.

Q. With a pick, you say? Is it kind—

A. It is an iron bar with prongs on the end.

(Testimony of Gerald Stintzi.)

Q. Prongs on the end of it? A. Yes, sir.

Q. And just one chunk of ice used or numerous chunks of ice used? A. Oh, numerous chunks.

Q. I see. And you say when the ice is chopped up, is it then salted?

A. Yes, some cars are salted and some aren't.

Q. Some are and some are not, is that correct?

A. That is correct.

Q. And when there is enough of it chopped up and it is salted, then the car is considered iced, is that the idea? [125] A. That is correct.

Q. All right. Is there a top they pull down on it then? A. Yes, with a lever.

Q. I see. And how many men ordinarily are out on top of that refrigerator car chopping away when you are icing one?

A. Oh, it depends. Sometimes there is two on each end. Mostly there is two on each end of a boxcar.

Q. I see. And do they ice more than one car at a time; in other words, do they work on a string of them sometimes? A. That is correct.

Q. And this conveyor belt that you are talking about, does it extend down the whole length of the icing dock? A. Yes, clear down to the end.

Q. In Exhibit No. 9, is that the conveyor belt that is indicated in the middle of the dock?

A. That is correct.

Q. Running way down to the end?

A. That is correct.

Q. That is correct. And ice is taken along that

(Testimony of Gerald Stintzi.)

conveyor belt and cars are iced all the way along that dock? A. That is correct.

Q. Now do you recall when you were carrying the ice, that is, the slush ice out with Allan Maine, do you recall [126] how many cars there were or how many freight cars or any kind of railroad cars there were on Track 13, which was just north of the dock?

A. There was quite a few to the west.

Q. Quite a few? A. Yes.

Q. And how about to the east?

A. You couldn't see only so far because there were men working back and forth taking salt off——

Mr. Cashatt: I object to that and move it be stricken, your Honor. There is no contention here that there was any work going on on those tracks over there.

Mr. Etter: What do you mean contention? He is just describing what was going on.

The Court: He is describing what he saw and could see. I will let it stand.

A. To our right or east of us there were men going from a boxcar back and forth taking salt from the boxcar into the pit.

Q. (By Mr. Etter): All right. And what was the situation in the other direction?

A. I took a glance down there and all I could see was a real long string of cars.

Q. In other words, the string of cars was to the

(Testimony of Gerald Stintzi.)

west and the working operation you saw was to the east, is that correct? [127]

A. That is correct.

Q. All right. And you say the longest string of cars was to the west, that is, toward the yard-master's office? A. That is correct.

Q. All right. And could you tell how many cars were up to the east?

A. I couldn't see past where they were working.

Q. I see. And that was at the salt dock?

A. That is correct.

Q. Salt house there?

A. That is where they put salt.

Q. All right. Now that is when you and Allan Maine were emptying the buckets, is that correct?

A. That is correct.

Q. And at the time that you were emptying them, is that correct, is that so?

A. That is correct.

Q. All right. Now after you and Allan would get a bucketful of ice, slush ice, will you tell us how you handled it and what you did with it?

A. We took it from Vallarano, we went upstairs and outside, then we went a little——

Q. Well, now, take it easy. Did you both have ahold of it?

A. Yes, we both had ahold of it, side by side.

Q. All right.

A. Then we went up this flight of stairs, turned to our left and then we were outside. Then we went to the west a little bit——

(Testimony of Gerald Stintzi.)

Q. To the east, you mean?

A. To the east—

Mr. MacGillivray: To the west.

Mr. Etter: To the west, all right.

A. To the west a little bit.

Q. All right.

A. To where the couplings were the closest to us, space. Then I would go under the coupling and Al would scoot the bucket to me halfway, help it, then from there I would give it a boost across the rest of the part of the track and walk one or two steps and then dump it, and then go right back underneath like we started.

Q. All right, did Al come through under the coupler with you to pull the ice bucket over?

A. No, he gave one great big shove so I could handle it enough when I went under.

Q. I see. Would you both swing it under first, is that the idea, you both stand and swing it under as far as you could first? A. Yes.

Q. All right, then you would go through? [129]

A. That is correct.

Q. All right, and after you got through, then what would you do again?

A. Then I would grab the bucket and give a great big toss and go about one or two quick steps and then empty it.

Q. And that, of course, was north of the track, north of Track 13? A. That is correct.

Q. Track 14 was just beyond further to the north? A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Now tell me where you were dumping it, what was the situation where you were dumping, tell us what it looked like?

A. Oh, it was a great big gulley where paper bags of salt and other things were laying there.

Q. All right, were there a lot of these sacks and debris lying there? A. That is correct.

Q. And was it just in that area or did it extend east and west?

A. I never looked down east or west.

Q. Well, handing you Plaintiff's Exhibit No. 10, does that represent the condition that you saw there? A. Yes.

Q. To the north? [130] A. That is correct.

Q. Was that the general condition?

A. Yes.

Q. And in Plaintiff's Exhibit No. 11?

A. That is correct.

Q. And likewise in this particular exhibit, No. 12, which is looking west, is that the way the area appeared to you? A. That is correct.

Q. That is correct. Now in this operation of carrying this slush ice over, did only you and Allan Maine participate in that, or was there somebody else doing that work along with you?

A. Well, once we traded off with Vallarano.

Q. I see. Once or more than once, do you remember? A. I don't remember.

Q. I see. And who was it that traded off, did you trade off or did Allan trade off that you recall?

A. I traded off.

(Testimony of Gerald Stintzi.)

Q. You did. Do you remember, Gerry, from the time you started with Allan and Joe Vallarano in this operation of carrying this slush ice out, do you remember how many trips you made before this accident occurred?

A. I would have to say approximately.

Q. All right, approximately? [131]

A. 8 or 9.

Q. 8 or 9. Do you remember how long it took to fill up this bucket? Was it a 5-gallon bucket, did you say?

A. I don't know how big it was, but it was a big one.

Q. It was a large bucket?

A. That is correct.

Q. And how long did one of these trips usually take, that is, to fill the bucket, carry it up the stairs and take it over the track, under the coupler and dump it and bring it back, do you recall?

A. Oh, it would have to be very approximately, about 5 or 6 minutes.

Q. Possibly that. That is your best recollection?

A. Yes.

Q. And you had made, you say, about 8 or 9 or possibly more? A. Approximately.

Q. Now what was the condition as to the illuminating lights that are up on top of the dock at around 8:15 or thereabouts that night?

A. All I know, when it started getting dusk, the lights on the dock would turn on.

Q. The lights were turned on?

(Testimony of Gerald Stintzi.)

A. They would be turned on.

Q. Well, they were turned on, were they?

A. I never noticed. [132]

Q. I see. All right, could you see, were you able to see? A. Yes.

Q. You were able to see. All right, do you know how many lights there are up there?

A. No, I don't.

Q. Do you know the distance of that dock running from west to east? A. No, I don't.

Q. You do not. Do you recall the last bucket that you and Al Maine unloaded, do you recall that time?

A. Yes.

Q. All right. Will you tell us in your own words just what occurred when you brought the empty bucket back and handed it to Al Maine, where you were standing and all of the details?

A. All right. I—we were going across the track and—let's see—Al Maine was swinging me the bucket, and all of a sudden there was a great big crash. I had my hand over so I could support it to pull it over. There was a big crash and then I let out a scream and then it started dragging me east, and I just bounced up and down until I come to the part where I was helped, part pulled and part drug out. And then I laid there and then some people started coming around and wanted my name and address, and then I started praying. [133]

Q. From the time that you started to take this slush ice out of the pit along with Allan Maine and carry it across the track, Gerry, from the time you

(Testimony of Gerald Stintzi.)

started and until the time you were hurt, did you ever see the foreman, Fincher, around?

A. No, the only time was up on the dock when he give some instructions.

Q. When he gave you the instructions. Between the time that you were given your instructions on cleaning this ice up and the time that you were injured, did you have any occasion to talk with Mr. Fincher? A. I had none.

Q. Or do you recall that Mr. Fincher talked with you?

A. No. The last time was up on the dock.

Q. And you had no further conversation with him? A. No, none whatsoever.

Q. Or no further instructions?

A. None whatsoever.

Q. And at the time you were upon the dock, what instruction did he give you on disposing of that ice?

A. He just said, what I can remember, he may have said other words but I don't recollect, he said, "Go across the track and take the slush and dump it."

Q. And dump it? A. That is correct.

Q. All right. Were you given any other instruction than that?

A. That was all. Maybe a little instructions about taking the slush out, about where the belt is, and that's all.

Q. That's all. And that was the last and only in-

(Testimony of Gerald Stintzi.)

struction, I assume, that you had between that time and your 8th, 9th, or 10th trip, whatever it was, when you were injured? A. That is correct.

Q. Now in carrying this bucket, that is, you and Allan Maine, in carrying this bucket out the door for the purpose of taking it north to the track, was there any other way you could dump it over where you were dumping it, that is, north of the track, than under the coupler? Was there any other way?

A. No, we could have maybe walked down a couple of boxcars extra and then went under the couplings.

Q. Well, how many boxcars would you have had to walk down toward the west?

A. Quite a few, as far as my eyes could see.

Q. I see. And how about down toward the east?

A. Well, there were men working back and forth taking salt off the boxcar.

Q. I see. And you went underneath the coupler, is that right? [135] A. That is correct.

Q. In accord with the instructions as you understood them? A. Yes, that is correct.

Q. I see. Now after you say that you heard this crash—was it a crash, Gerry?

A. Yes, it was the loudest crash I have ever heard.

Q. All right. Tell me, were you facing the oncoming car or was your back to the oncoming car?

A. My back was to the oncoming car as I was looking east.

Q. You were looking east, this way?

(Testimony of Gerald Stintzi.)

A. That is correct.

Q. And had your leg this way (indicating), is that the idea? A. That is correct.

Q. And it came this way? A. Yes.

Q. All right. And it was your right leg?

A. That is correct.

Q. Have you any idea how far this movement of the train carried you and thumped you along the track, Gerry?

A. I couldn't remember, I was too busy screaming and hollering.

Q. I see. And do you remember or recall it passing over any other part of your arm or body?

A. It just felt like my arms and my legs were just taken [136] off, they were just going over everywhere.

Q. Tell me this, were you dragged or did you roll, can you recall?

A. It dragged me, it just drug me along. It took the leg, I don't know why it didn't roll over it, it just drug me along.

Q. Along that distance?

A. That is correct.

Q. All right, and were you finally off the side of the track or did the movement of the train stop?

A. Oh, it kept on going.

Q. I see. And you were there at the side, is that correct? A. That is correct.

Q. And did you suffer rather extreme pain, Gerry? A. I couldn't describe it.

Q. Did you know that you had lost your leg?

(Testimony of Gerald Stintzi.)

A. I knew then.

Q. You knew then? A. I knew then.

Q. Could you tell the jury what it felt like, if you can?

A. Something like somebody with a blow torch going across.

Q. And did you have that same feeling in your arms? A. Yes.

Q. You did. Did you lose consciousness?

A. In intervals I would lose it. The pain would hit me, [137] certain part, and I couldn't stand it and I would pass out, but I come right back to.

Q. You tell us then what occurred when they came after you.

A. Well, I was laying alongside of the track and some man had his arm around me and was talking and that, and then I started telling my name and where I lived and everything so they could tell my mother.

Q. All right, go ahead.

A. And then from then on I just started praying.

Q. All right, do you remember when you got to the hospital?

A. I don't remember anything for quite awhile then. That was I just blacked out.

Q. I see. Well, after that, after you got to the hospital, Gerry, do you recall when it was that you regained consciousness or semblance of consciousness that you can now remember?

A. The only consciousness that I remember is I

(Testimony of Gerald Stintzi.)

would wake up for a short while and start screaming, like boiling water on me, and they would give me a shot and then I wouldn't know any more.

Q. Do you remember, or can you tell the jurors, what day it was or what month this happened? On July 17th, did it not, 1952?

A. That is correct. [138]

Q. Have you now any independent recollection or remembrance, Gerald, of the day that you began to remember things in the hospital after this accident?

A. No, I don't. I was all over the place.

Q. Well, do you recall that you started to know what the things were about before Christmas of that year?

A. Oh, yes, before Christmas.

Q. That is what I am getting at.

A. Yes, it was before Christmas.

Q. All right, you don't recall in days, though, how many days after it was?

A. No, I don't.

Q. Do you recall whether it was before Thanksgiving Day in November?

A. Oh, yes.

Q. It was. But you don't just recall how many days, is that correct?

A. No, I don't.

Q. All right. Well, after you regained consciousness in the hospital, from the time at least that you can remember, will you tell us what feeling you had with regard to your extremities and your general physical feelings?

A. Well, they gave me shots, but they sure didn't do me any good because it just felt like I was torn

(Testimony of Gerald Stintzi.)

all apart. [139] My leg was feeling like a team of horses was pulling it, my left leg.

Q. How long did this continue?

A. For quite awhile, for months.

Q. Do you recall the times that you were taken to surgery?

A. Yes, some times, not when I first got there.

Q. You don't recall when you first got there?

A. No.

Q. Do you recall when you were taken to surgery, Gerald, about a week, and just about a week after you had been worked on in surgery you were taken back for about a week? Do you remember when that was? Do you remember the occasion when they inserted the pegs in your left leg?

A. No, I don't. When I woke up, they were in my leg.

Q. In your left leg? A. Yes.

Q. But I mean, you remember, though, or you don't remember being taken in to surgery for that?

A. I don't.

Q. I see. Now about a month later or so, on August the 4th, do you remember when they started some skin grafting work?

A. Yes, I remember when they started skin grafting.

Q. Will you tell us what that first skin grafting was, if [140] you recall?

A. It was taken from my stomach, they started putting it on my stump.

Q. They started putting it on your stomach?

(Testimony of Gerald Stintzi.)

A. Stump.

Q. On your stump?

A. Off my stomach to my stump.

Q. They took it off the stomach and put it on your stump. I see. And do you recall how many times you were in surgery for that purpose?

A. No, I don't.

Q. You don't recall? A. No, I don't.

Q. Do you recall the blood transfusions that you had? A. Yes.

Q. Do you recall, were they quite numerous?

A. Yes.

Q. I see. Would that be during or immediately after surgery in most of these cases?

A. I would always wake up with a bottle and be under oxygen.

Q. I see. Now do you remember any surgery that was performed for the removal of a bone bridge on your arm in October, your right forearm? A. Oh, yes. [141]

Q. You recall that? A. Yes.

Q. And during the time that you were there, for the 256 days that you were in the hospital, what was your situation as to being able to sleep, Gerry?

A. I never slept for months and months; I just, I don't know, just dozed off.

Q. Were you able to sleep at all without sedatives? A. No, I always had sedatives.

Q. And did that continue practically all the time that you were in the hospital?

A. 90 per cent of the time.

(Testimony of Gerald Stintzi.)

Q. 90 per cent of the time. What was the condition you had with respect to pain, Gerald?

A. The pins would always drive those severe pains, those pins through my leg, just sharp knife pains.

Q. Did you have pain, too, so far as your vital organs were concerned? A. Oh, yes, yes.

Q. And, tell me, does that still persist?

A. Yes, it has a burning sensation.

Q. And persists to this day, is that correct?

A. That is correct.

Q. And the stump of your leg, what is the situation with that right now? [142]

A. It has a draining part and it just has a funny sensation all the time.

Q. Have you had some drainage from that for sometime past now? A. That is correct.

Q. For about how long have you had that drainage?

A. Two months, something like that, a month or two months.

Q. A month or two months?

A. That is correct.

Q. All right. After you got out of the hospital and you were taken home, did you get up and around or were you in bed at home for some length of time?

A. I was home in bed for some length of time.

Q. Do you remember how many months?

A. No, I don't.

Q. Did you start to try to move around after

(Testimony of Gerald Stintzi.)

you got home, or were you returned to the hospital for further surgery?

A. I moved around after that, after I don't know how long, I moved around with a brace.

Q. You moved around with a brace?

A. That is correct.

Q. Now when you left the hospital, Gerry, besides the fact that you had lost your right leg, what was the condition with respect to your left leg?

A. Well, I couldn't bend it, it just bent to a little [143] degree, and my mother was supposed to half carry me and help me with this brace so I couldn't put much weight on it when I went to the toilet.

Q. Tell me this, when you left the hospital was your left leg in a brace?

A. That is correct.

Q. And where did that brace fit, along the outside or the inside of your leg?

A. From the outside of my leg, from my hip down to the shoe.

Q. From your hip down to the shoe?

A. That is correct.

Q. Was any part of that brace pinned on through the bone? A. No.

Q. It was not. Had they removed those pins?

A. As soon as they removed the pins, I woke up with a brace on my leg.

Q. In other words, after the pins were removed, they placed a brace on it? A. Yes.

(Testimony of Gerald Stintzi.)

Q. And when you were taken home, you had the brace on your left leg?

A. That is correct.

Q. What was the situation with regard to your right arm?

A. Oh, it was really—I couldn't strengthen or bring it out at all and I couldn't twist it back and forth. [144]

Q. Did you have any cast or otherwise on your right arm when you were taken home?

A. No, I didn't have any cast on.

Q. But you had the brace on your left leg?

A. That is correct.

Q. Did you have crutches at that time?

A. Yes.

Q. Are those the crutches right there that you have?

A. No, I was too weak, I used wooden ones.

Q. The ones up under your arm pits, is that correct?

A. That is correct.

Q. You used those at that time?

A. That is correct.

Q. And how long were you home before you went back to the hospital, Gerald?

A. I couldn't tell, I wouldn't know the time.

Q. But you were in the hospital through, Gerald, July, August, September, October, November, December, January, on into '53, isn't that right, last year?

A. That is correct.

Q. Somewhat approaching 9 months?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Then you went back, did you, to the hospital again? A. That is correct.

Q. And what was the purpose in your return to the hospital [145] the last time?

A. My arm, it was in so much pain they opened it up, opened and did something to it, removed something.

Q. What is that, the stump?

A. My arm.

Q. Oh, it was your arm? That was the last trip, you went back for the arm?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. And worked on that. Have you been back to the hospital since? A. No, I haven't.

Q. Have you been going to your doctor for treatment, however, since? A. Oh, yes.

Q. All right. Now what attempts, Gerald, have you made to strengthen your body since this accident?

A. I tried tumbling and then my arm couldn't take it so I switched to dumb bells where I could relax if it started hurting, to build myself up.

Q. Where did you go for the purpose of taking these exercises?

A. Down in the basement of the YMCA.

Q. In the basement of the YMCA. Have you conscientiously [146] worked on this exercise deal to try to develop yourself?

A. Yes, I have.

Q. Have you tried swimming?

(Testimony of Gerald Stintzi.)

A. Yes, I have.

Q. And have you done a little swimming?

A. I did some at the YMCA, but I fell down once and I didn't try it any more. I went to the lake and had help.

Q. I see, you haven't since. Have you been able to continue your exercises or not?

A. Not to an extensive—not real exertion, just to keep myself.

Q. All right, what happened that you had to stop, Gerry?

A. This hand, it just grips for so long and then the grip is gone.

Q. Has your arm improved any, that is, the right forearm, with your exercises?

A. Been no strength, no.

Q. Would you take that jacket off a minute, please, and roll up your sleeve so this jury can take a look at that arm? Just up to your elbow, Gerry.

A. Yes.

Q. Fold it back so they can see it.

A. (Witness complies.)

Q. If you will turn that back, can you turn that over a [147] little bit?

Mr. Etter: (To the jury): Can you all see this arm?

Q. Will you fold it back up this way, Gerry? Flex it around that way.

A. (Witness complies.)

Q. Now will you explain to the jury what diffi-

(Testimony of Gerald Stintzi.)

culty, if any, you have in the use of this arm. What is it you can't do?

A. It is okay when I go like there (indicating), but when I bring my arm back, the fingers I can't straighten.

Q. What strength does it have when you stretch your arm out in this fashion ((indicating))?

A. In that fashion, that is what happens when I have it straight out (indicating).

Q. Have you any strength there?

A. No.

Q. If you will explain what exercises you have been giving those fingers and explain to the jury how each one of them works and what difficulty you may be having.

A. I was using the rubber ball to get it, because before I couldn't even squeeze a little old sponge. And the two fingers I have got that work pretty good is the two middle ones, but this one here won't close and the end of this one here is dead, just won't—

Q. Which one is dead? [148]

A. This one (indicating).

Q. Can you put this thumb on it, or not, and this one down?

A. That won't close, it just wriggles out like that (indicating).

Q. You just have use of those two middle fingers? A. Yes.

Q. What other exercises do you have besides that?

(Testimony of Gerald Stintzi.)

A. I take and go back and forth like this to strengthen my wrist up and pushups.

Q. But your situation here that you have pointed to, that side has not responded, is that correct?

A. That is correct.

Q. All right. Now, Gerry, did you go down to your doctor and attempt to get a specially built leg that you could use? A. Yes.

Q. And do you recall about how many months ago that has been, Gerry?

A. Quite a few. It has been—I couldn't say exactly, but it has been quite a few.

Q. And what kind of a device was it that they built for you?

A. It had a belt around my hip with kind of a cup on my stump and a strap over my shoulder.

Q. And who did you have build or construct this for you, [149] Gerry? A. Schindlers.

Q. That is the Schindler artificial limb people?

A. That is correct.

Q. And they made it with a belt that comes over the shoulder?

A. That is correct, over this left shoulder.

Q. And a strap that goes around the waist?

A. Yes, a big belt that goes around my waist.

Q. All right, and fitted it to the situation which they found on your right side?

A. That is correct.

Q. After you got that, did you try to use it?

A. Yes.

Q. And try to walk with it?

(Testimony of Gerald Stintzi.)

A. That is correct.

Q. Have you been able to use it, Gerry?

A. No. With the use of crutches, I can make a snail's pace, but that is about it.

Q. In other words, even with leg on, you have to use the crutches?

A. Yes, and sometimes I can maybe use one on a flat deal, but when it comes to stairs, I just need help then when I come to stairs.

Q. All right. Have you taken it back to Schindlers and told [150] them just exactly what the result of your trials and experiment has been?

A. Yes, and they just put a couple of pads on the deal and say, "Well, try the best you can."

Q. You have tried it with the pads?

A. Yes.

Q. I see. Now will you tell the jurors what the effect of the straps and wearing this has on the rest of your body, that is, where you had the skin grafts and likewise your shoulder.

A. When I have it on my left shoulder, I have a graft here, when the belt is on when I am sitting down supposed to be relaxed, it starts to burn, the heat of this leather, and then my stump, the nerves of my stump, that heat just starts my foot going all over, and when I get up it pulls up on this socket or supposed to be of the leg, and when I start to walk I push back down on it and that starts sort of on my stump, and my back is all out of kilter, I get an ache in my back, about the time I am done I'm ready for bed.

(Testimony of Gerald Stintzi.)

Q. Have you found it better on your nervous system and your physical well being to use your crutches?

A. Yes, it feels like I have lost about 10 or 15 pounds after I have used that leg.

Q. And how many times have you tried using that leg? [151]

A. Well, I couldn't say how many.

Q. Have you been consistent about trying to use it? A. Oh, yes.

Q. And what has been the extent of any nervous difficulty that you may have had in the past few months?

A. Oh, my nerves are just jumpy, my nerves are just coming to the point like when I sit in school or that, I just start getting jumpy.

Q. Have you been under treatment ever since you left the hospital for the nervous condition?

A. I had some pills ordered by my doctor for nerves, but then they didn't do me any good.

Q. I see. A. Made me sick.

Q. And of late have you had any difficulty as a result of these discharges that you are having from the stump?

A. Yes, there has been little bones coming out of my left leg, out through the holes I have in my leg.

Q. That is out of the left side?

A. The one I have.

Q. I see. And how about the stump, has there been further discharge from that lately?

(Testimony of Gerald Stintzi.)

A. Oh, when I sit down, I have to sit on my side because after awhile the nerves start jumping.

Q. All right. Gerald, prior to the time of this injury, [152] did you participate in activities in the church, that is, solo singing?

A. That is correct.

Q. And do some choir work?

A. That is correct.

Q. And you likewise turned out, did you not, at the Rogers High School freshman track?

A. That is correct.

Q. And what events were you featured in out there as a freshman, Gerry?

A. I ran the mile and did some broad jumping and cross-country.

Q. And play football? A. Yes.

Q. And did cross-country work?

A. At the same time.

Q. At the same time. Were you planning and were you contemplating when you were at Rogers High School a scholarship by virtue of your athletic ability? A. Yes.

Q. I assume that you didn't have the financial savings to put you through college otherwise?

A. No.

Q. And by working and a scholarship, is that correct? A. That is correct. [153]

Q. And what did you plan on going to school, what had you planned on taking?

A. I wanted to be a doctor.

(Testimony of Gerald Stintzi.)

Q. You wanted to take up medicine, is that correct? A. I wanted to be a psychiatrist.

Q. I see. And this track work, I think you started, as you explained, from the time you were in grade school? A. That is correct.

Q. And did you follow during those years in grade school and up into high school a serious conditioning program?

A. I used to practice and run everywhere I went, and I used to go out to the Rogers track and practice running until dark.

Q. You did that with the Rogers varsity when you were still a grade school kid, didn't you?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. And your coach at Rogers was Mr. Elsensohn, is that right? A. That is correct.

Q. When you were there as a freshman?

A. That is correct.

The Court: Time to suspend now, Court will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Tuesday morning, June 29, 1954.)

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Proceed.

GERALD STINTZI

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Etter): Gerald, you have regained some function in your arms, have you not?

A. That is correct.

Q. Would you explain to the jury the thing that you are [155] still having difficulty with your hand and your fingers? A. Yes, I have.

Q. What measures do you take now, if you can tell the jury, to try to work your hand and your fingers and your wrist back into some semblance of shape?

A. Well, I have been practicing by putting my hand on tables, flat objects like that, and pressing down and trying to bring it up so I could try and strengthen, straighten the fingers.

Q. How long have you been so doing?

A. I have been doing it since I have been out of the hospital.

Q. Since you have been out of the hospital. And the response that you have received from your hand and your fingers you have indicated in your testimony to the jury, have you not?

A. That is correct.

Q. All right. Now, Gerald, have you some considerable difficulty in doing the things now that you used to do before you were injured, that is, the ordinary things that we all have to do, getting out of bed in the morning and things like that?

(Testimony of Gerald Stintzi.)

A. Yes, quite a bit.

Q. And how do you get out of bed in the morning, will you tell the jurors? [156]

A. Well, I used to just jump right out of bed, but now I roll and push myself over to the side with my good hand and then I balance myself so I can get my clothes, and then I sit down on the bed so I can put my pants on, and so on.

Q. All right, and you shave now?

A. Yes, but I have to hold with one hand while I squeeze the tube.

Q. This leg that you have, the one that was made, this prosthetic device by Schindler, are you able to use that for a brace, Gerald, have you tried that?

A. I have tried, but it hurts so bad that after I get done using it the nerves are so bad I just have to go to bed.

Q. And has that resulted in difficulty here lately trying to use that? A. That is correct.

Q. To what is left of your right leg there?

A. Yes.

Q. What has happened as a result of that?

A. Well, started drainage and I had a whole bunch of blisters to my stump—you could call it blisters—and they have healed up, but as soon as I put it back on it starts all over again in a different spot.

Q. Have you discontinued using that entirely?

A. Yes, I have.

Q. I see. And as I gather it, then, any of your

(Testimony of Gerald Stintzi.)

shaving or brushing your teeth or washing of your face or anything like that, you do it by leaning up against the bowl, is that the idea?

A. Yes, I lean up against the side.

Q. And that has been since you were ambulatory, in a fashion so you could get around a little bit?

A. That is correct.

Q. All right. Do you have any difficulty bathing, Gerry?

A. Yes, I have an awful lot of trouble getting into the tub.

Q. And do you have some assistance there?

A. Yes, my mother helps me.

Q. And has she done that ever since you were able to get around?

A. Yes, she used to carry me, she used to half carry me and have to get me into the tub so I wouldn't slip.

Q. I see. And you have had that care from her, have you?

A. Yes, I have.

Q. Ever since you were able to get in the bathtub?

A. That is correct.

Q. And are you able to do that alone now or not?

A. No, she always has to help me.

Q. And another thing, did you have a number of friends that [158] you ran around with, as youngsters do, prior to your injury?

A. Yes.

Q. What has been your situation there as far as recreational activity is concerned, other than the YMCA and the swimming and one thing and another that you have tried to do down there?

(Testimony of Gerald Stintzi.)

A. That has been about it. When I go out with my friends and that, it just cuts me out right there.

Q. And these crutches that you have, have you had any difficulty, Gerald, in using them continuously?

A. Well, my right hand gets awful tired if I go any long distance, just cramps up on me.

Q. I see. Let me ask you, since the accident you were out of school a long time, were you not?

A. Yes, I was.

Q. Have you gone back to school? A. Yes.

Q. And what is that, summer school?

A. I have been going to summer school.

Q. Have you also been taking special courses?

A. I was too sick in the hospital. They wanted me to in the hospital, but I couldn't.

Q. Since that time, Gerald, have you taken some special courses? [159] A. No, I haven't.

Q. Now summer school has been up at Lewis & Clark, has it not? A. Yes.

Q. How have you managed to get to school?

A. I have a friend that comes by and picks me up every morning.

Q. And you have made arrangements, have you, for the past year and a half for that transportation?

A. Yes, I have.

Q. And does he handle your books for you?

A. Yes, he carries my books to every class I go to.

Q. When you are walking or using your crutches, are you able to carry any of those books?

(Testimony of Gerald Stintzi.)

A. I can carry a few things, a tablet and some pencils and that, but that is it.

Q. And have you tried to handle it all yourself, Gerry? Did you try to handle it when you went back to school?

A. Yes, I tried.

Q. And were you able to?

A. No, I wasn't.

Q. And you have had this assistance, have you, constantly since you have been back to school?

A. Every class I go to I have had friends to help me.

Q. All right. One other thing, are you able to carry [160] anything, Gerry, when you are standing up, anything of any size; that is, when you are using those new type crutches that you have there?

A. No, I have trouble with my balance. If I start getting some other objects, that throws my balance off.

Q. I see. And tell me this, have you been under treatment or have you received some treatment for any nervous disorders in the past few months?

A. Yes, I have from my doctor.

Q. I see. What is your situation with regard to sleep?

A. Well, at night, some nights my nerves just won't let me go to sleep, and then some nights the pain in my leg just won't let me go to sleep.

Q. And have sedatives been prescribed ever since this accident?

A. I have had nerve pills, but they made me sicker than I was so I had them cut out.

(Testimony of Gerald Stintzi.)

Q. Have you been using anything else lately for your sleep? A. Just aspirins and that.

Q. And has that been fairly constant at different times? A. It has been quite constant.

Q. Let me ask you, these nerve disorders, Gerald, are they sporadic, I mean do they come ever once in awhile without your being able to control them, is that the idea?

A. Yes, they just come. [161]

Q. And at practically any time, is that it?

A. That is correct.

Q. In other words, you haven't a consistent disorder, it is just something that sporadically occurs?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. Have you participated in any school plays or other activities since this accident?

A. No, I haven't.

Q. And did you formerly? A. Yes.

Q. But you have not done so since?

A. No.

Q. Did you at one time compete in dancing exhibitions as a youngster? A. Yes, I did.

Q. And were you fairly successful?

A. Yes.

Q. You haven't been able to do any of that since? A. No.

Q. I see. These things that you formerly did, have you tried to do any of them, Gerald?

A. Oh, yes.

Q. In the past year? [162]

(Testimony of Gerald Stintzi.)

A. I have tried, about everything I could try.

Q. Have you been able to achieve any success?

A. No, I haven't.

Q. And what has been the biggest reason for that? A. In which way do you mean?

Q. For anything that requires you to be ambulatory or move around?

A. Well, the crutches all the time, everywhere I go just have to have those crutches with me, and it just—

Q. And the leg that you had made and have had re-fashioned a couple of times, you haven't yet been able to use that? A. No, I haven't.

Q. Are you able to walk upstairs?

A. With the leg?

Q. Yes? A. No.

Q. Or downstairs?

A. That is twice as bad yet because it buckles. Every time I throw it out, it just buckles.

Q. And you do manage to get up and down with these crutches that you have here?

A. I do.

Q. Is that correct? A. That is correct.

Q. Gerald, prior to working for Addison Miller, had you worked there before? A. Yes, I did.

Q. And when had you worked there before?

A. It was in '50 or '51. I have had so many jobs, I had jobs all over.

Q. Let me ask you, as a youngster have you had other employment prior to the time that you worked for Addison Miller with other employers?

(Testimony of Gerald Stintzi.)

A. Oh, yes.

Q. That wasn't the first time you ever worked?

A. No.

Q. And tell the jurors, if you will, some of the places where you worked and some of the employers that you have had.

A. Well, I started working when I was about 13, I went at Grand Coulee on the dam in construction there, and at Metalline Falls in the mines, Pend Oreille Mines.

Q. What did you do in the mine, Gerry?

A. I was a mucker. That is running this machine that pulls it up in the stope, pulls your material.

Q. You were operating a mucking machine?

A. That is correct.

Q. In the stope? A. Yes. [164]

Q. And that is in, of course, the end of your tunnel, is it not? A. Yes.

Q. A mucking machine is a contrivance that loads it back on? A. Yes.

Q. You worked, assisted on that?

A. Yes.

Q. All right.

A. And I have worked on bridges, when they were building that new bridge in Metalline Falls, I helped there, and truck driving in the wheat harvest and everything, picking berries.

Q. Have you done pretty much toward earning all of your living since you were about 12 or 13?

A. Yes, I have.

(Testimony of Gerald Stintzi.)

Q. Up until the time of this injury?

A. Yes, I have.

Q. Now how many cars were there, or did I ask you that before, that were on Track 13 on the night that you were injured?

A. There were just—to the west of me there was just cars like as far as I could see.

Q. Well, did you know whether those were cattle cars, Gerry, or not? [165]

A. There might have been a few, but they were all not cattle cars.

Q. Is that your best recollection? A. Yes.

Q. Now those cars were spotted or at least they weren't moving there around a quarter to 8 or thereabouts when you were taking the slush out?

A. No, they weren't.

Q. They had been spotted there, but they were there, is that the idea?

A. Yes, they were froze right there.

Q. Do you know how many there were, whether there were 7, 8, 10 or 13 or whatever it was?

A. I couldn't say the number, but there was quite a few.

Q. There was quite a few as you recall it?

A. Oh, yes.

Q. And you, I think, told me that you had worked there in either '50 or '51?

A. That is correct.

Q. Do you recall how long it was that you worked there in that year?

A. It wasn't very long.

(Testimony of Gerald Stintzi.)

Q. I mean was it two weeks or a month, or do you recall how many days it might have been?

A. Approximately two weeks, around two weeks.

Q. Around approximately two weeks?

A. Something like that.

Q. And the work that you did, was it practically the same work as you were doing in 1952 prior to the time of your injury? A. Yes.

Q. Well, tell me, during the time that you worked for Addison Miller, do you recall other occasions when cars were either on Track 13 or Track 12, which was on the opposite side of the dock, I mean were spotted there?

A. Yes, they were always spotted there when we were working.

Q. I mean there were occasions other than this present time when cars were spotted on Track 13?

A. Yes.

Q. During the time you worked there?

A. Yes.

Q. I see. All right, going back to that situation, Gerald, where cars had been spotted there either on 12 or 13, north or south of the icing dock, do you recall in the time that you worked there, either in the year previous or in this year when you were injured in 1952, that any cars were ever moved on those tracks into those standing cars other than this time? A. No. [167]

Q. You never knew of any other occasion?

A. No.

Q. Was it your understanding on July 17th that

(Testimony of Gerald Stintzi.)

when you were working there in 1952 that those cars that were out on that track were frozen there?

A. Yes.

Q. That was your understanding?

A. That was my understanding.

Q. Did you have, as a result of your prior work there, Gerald, on that icing dock doing various jobs, on this night in question when you and Allan Maine and Joe Vallarano were taking this bucket of ice across or swinging it under the coupler and dumping it over there north of Track 13, did you as a result of your experience have any reason to believe that any cars would be moved while you were working there?

Mr. Cashatt: I object to the form of that question.

Mr. McKevitt: Leading.

Mr. Cashatt: It is leading.

The Court: I think that calls for a conclusion, yes. I will sustain the objection.

Q. (By Mr. Etter): Did you expect then that any cars would be moved while you were working there? A. I didn't expect any.

Q. You did not? [168] A. No, I didn't.

Q. Was that as a result of your other experience that you had had?

Mr. Cashatt: I object to that, your Honor.

The Court: Well, yes, that is leading.

Q. (By Mr. Etter): Why was it that you didn't expect any cars to be moved?

A. Because I never had that experience before.

(Testimony of Gerald Stintzi.)

When I looked down to the right of me, there were men working taking salt from the boxcar into the salt pit and that was insurance that there wasn't going to be any cars threw in there.

Q. That was just before you were injured?

A. Yes.

Q. I see. Now this salt unloading operation, can you tell us, Gerald, did you ever work on a salt unloading operation? A. Yes, I have.

Q. Let me see, yesterday, Gerald, you looked at Exhibit 16, do you recall? A. Yes.

Q. And will you tell the jury again what that Exhibit 16 represents, that photograph?

A. This is what they call the salt pit or the salt dock (indicating), and those two slides over here are to the [169] salt pit.

Q. And the two slides to which you are directing your attention now over here, these doors are on that half of Exhibit 16 or the photograph upon which appears a "W" or west, is that correct?

A. That is correct.

Q. And that is the two you make reference to. Will you go ahead and explain what you were going to about those two entrances?

A. Well, there is a boxcar right along side there, the doors—

Mr. Cashatt: If your Honor please, I would like to object to this line of questioning. I wonder if we could approach the bench?

The Court: Well, all right.

(Testimony of Gerald Stintzi.)

(Whereupon, the following proceedings were had between Court and counsel at the bench, in the presence but out of the hearing of the jury.)

Mr. Cashatt: Your Honor, in the original complaint, the amended complaint, and in the statement of contentions, it was all based on the icing of cars, icing operations, and there has been at no time at any of the proceedings, the original complaint, the amended complaint, or the statement of issues, any contention that there was any unloading of [170] salt at the location of Track 13 upon the night of the accident. And yesterday on the first question that was asked in that regard, I made that objection and your Honor permitted the answer that he could testify, as I recall, to what he saw. But it is our position that that is a new element that is being injected into the case and it is outside of any pleadings or issues raised by the statement of contentions.

The Court: Well, as I understand it, it isn't your contention that he was injured in connection with any salt?

Mr. Etter: Absolutely not, it is just an ancillary operation. No, we are not complaining that it had anything to do with it, but it is a factor of notice, we allege notice and that they should have had notice.

Mr. MacGillivray: Our contention is this, he was there while engaged in icing operations. To show the circumstances surrounding it, I think we are

(Testimony of Gerald Stintzi.)

entitled to show that at the time he was engaged in icing operations, other members of the crew were engaged in salt operations, which would have two purposes: first, to lead him to believe, as a reasonable person, that those cars would not be moved, and, secondly, to lead the railroad employees to anticipate that there were men working about that track at the time these cars were switched in there.

Mr. McKevitt: Of course, the allegations in the original complaint, your Honor, and the amended complaint, [171] especially in the amended complaint, you can't read that. I gathered the impression that at the time of this injury he was engaged in icing refrigerator cars, because they allege that those cars had been spotted there for the purpose of being iced, and that is the contention in the statement of issues, also.

The Court: Well, I think that is proper here, regardless of whether it is specifically alleged in the pleadings, to show anything that might bear on, first, his notice of danger, that he is going into a place of danger. You have got *volenti non fit injuria* here in your pleadings, although you call it assumption of risk, and you have got that element here, what should he have known, what he should have known about the dangerous conditions. Then you have contributory negligence, should he have known, should he have gone in there.

I think he would have a right to show that along in this string of cars somebody was carrying some-

(Testimony of Gerald Stintzi.)

thing out. You would have a right to show that a locomotive was coming down whistling madly. All those things should be shown on either side.

I will overrule the objection.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: All right, proceed.

Mr. Etter: Mr. Oden, can you give us the last question, please?

(Whereupon, the following question was read: "And that is the two you make reference to. Will you go ahead and explain what you were going to about those two entrances?")

Q. (By Mr. Etter): These are the two entrances here that you refer to (indicating)?

A. The boxcar door is open right alongside the window that is into the salt pit, and we put a ramp across, it is either metal or wood, I don't remember, and we have a little cart that we load the salt bags on and we——

Q. Would that be a hand-truck?

A. Yes, a hand-truck.

Q. All right.

A. And then we run it up to this platform that runs across right up to the edge of the window there, and then somebody grabs it from there and carries it over and piles it inside the salt house.

Q. Was that the only way that you transferred the salt from the boxcar into the salt house or were there other ways?

A. Well, sometimes some of them would be more

(Testimony of Gerald Stintzi.)

energetic, they would take one salt bag and carry it to the [173] platform, but it would be about the same.

Q. I see. Now after it was in the salt pit, so-called, how was it used in there, how was it transported out of the salt pit?

A. They carried it over to this little elevator they had that—oh, truck or what do they call it? It is a little pulley car they carry the salt bags to the elevator.

Q. All right.

A. And they load it, they take it and they put it on the elevator and—

Q. Is the elevator or where the elevator operates shown on this picture, that is, Exhibit 16?

A. I don't see the elevator.

Q. No, not the elevator, but where the elevator is used, is that shown? A. Yes.

Q. Can you point out what entrance indicates that?

A. I couldn't say exactly, but I know it is right in this vicinity here (indicating).

Q. You are pointing, are you, just to the left of the crease in the picture? A. Yes, I am.

Q. I see.

A. It goes right up to the level of the dock, up on top. [174]

Q. It is taken up to the level of the dock on top, is that right? A. Yes.

Q. And that is this house that appears up here?

A. Yes.

(Testimony of Gerald Stintzi.)

Q. All right, and then what is done with it?

A. Then it is stacked in the house, some of it, and some of it is on those push cars, it is taken and pushed down the dock toward the east, and then they are laid out, spotted, so we can put the salt in the boxcars that we are going to ice.

Q. On these cars that may appear or may have been spotted along the icing dock, is that correct?

A. That is correct.

Q. And is that what constitutes what you call a salting operation?

A. Yes.

Q. From the first step of transporting it from the freight car up until the time it is taken on to the icing dock, is that correct?

A. Yes.

Q. Gerry, the brace was removed from your left leg when you went home, is that correct?

A. That is correct.

Q. And that brace replaced a cast with 4 screws that had [175] been put into the leg from the hip on down below, is that right, or nails or whatever they are?

A. It had 4 pins before I had the brace put on.

Q. That's right, and did they remove those pins and then put the brace on?

A. Yes, they did.

Q. What is the condition now of your left leg?

A. In what way?

Q. As to strength and function, flexibility, extension?

A. Well, bending it all the way up, I can't bend it all the way up.

(Testimony of Gerald Stintzi.)

Q. You are not able to do that yet?

A. Not all the way up. And I have pains in the left side of my leg all the time where there is pieces of bone coming out of the holes.

Q. Is that up on the upper third, you would say, the upper two-thirds of the whole extremity?

A. Yes.

Q. I see. And have you the same function as you had before? A. No, I don't.

Q. And this stiffening you talk about, when does that occur?

A. In the morning when I get up.

Q. I see. And you have, have you, full extension and [176] flexion of that leg?

A. Straight out?

Q. Yes? A. Yes, I have straight out.

Q. I see. What is its condition as to strength?

A. Well, I never judged it for strength. It gets me where I am going on crutches.

Q. I see.

Mr. Etter: Your Honor, there are these picture exhibits that we have introduced. To expedite this matter, I wonder if it would be appropriate at this time, rather than hand them around to the jury, if I could have Gerry either be seated here or stand here and go through them quickly with the jury and explain what those views are? It would probably take only about five or ten minutes, rather than just hand them around. There are about 15 of them and I think probably they might have an understanding of this whole picture if we did that.

(Testimony of Gerald Stintzi.)

The Court: Well, all right, you may do that.

Q. (By Mr. Etter): Gerald, would you rather sit down here or hold these up to the jury and explain them to them? A. All right.

Mr. Etter: I will move this chair down here so we can accomplish that. [177]

I might say that will conclude our examination of the witness, your Honor.

Mr. Cashatt: Your Honor, I believe they were all testified to yesterday on the witness stand.

Mr. Etter: They were testified to.

The Court: They were, I think.

Mr. Etter. The jury hasn't seen them and I think just cold, if the jury took 15 minutes, they might wonder what the views were about, and I thought he could just say, "This is a view of so and so."

The Court: I think what he had in mind was to do this rather than pass them around. I don't think there should be detailed testimony.

Mr. Etter: Oh, no, not detailed.

The Court: Just enough to identify them. Just have him state enough to identify each one.

A. This is the tunnel going to the ice house.

Mr. Etter: Just stand back a little, Gerry.

The Court: Let counsel see them, too, of course.

Mr. Etter: Yes.

The Court: He is around to your left there.

A. That is another picture of the tunnel going to the ice house.

The Court: Mr. Etter, I wonder if you shouldn't

(Testimony of Gerald Stintzi.)

have the number given each time? You can look at it and give the [178] number, because otherwise the record won't show what he is talking about.

Mr. Etter: Certainly. The first one that was shown was Plaintiff's Exhibit 2; the second one was Plaintiff's Exhibit 3; now showing Mr. Stintzi Plaintiff's Exhibit No. 4.

A. That is just coming out of the tunnel from where they make the ice, going right up on to the dock.

Q. And handing you now Plaintiff's Exhibit No. 5.

A. That is the place where we took the ice, the slush.

Mr. Etter: That is looking down to the sump pit, Frank.

Have you all seen this? All right.

Q. Plaintiff's Exhibit No. 6.

A. That is another picture coming just from the tunnel going up to the deck—or the dock.

Q. Plaintiff's Exhibit No. 7.

A. That is where we came out to go across the track.

Mr. McKevitt: It is understood all pictures Mr. Etter has shown thus far are pictures of the interior.

Mr. Etter: That is correct.

Mr. McKevitt: Of the interior of the ice house.

Mr. Etter: That is correct.

Q. Plaintiff's Exhibit No. 8.

(Testimony of Gerald Stintzi.)

A. That is right—that little house is where you come up [179] on to the dock.

Q. What direction are you looking there?

A. You are looking west.

Q. Plaintiff's Exhibit No. 10.

A. That is the track north of the dock and that is looking east.

Q. Looking east? A. Yes.

Mr. McKevitt: That is the track you crossed over, Gerald? A. Yes.

Mr. Etter. Track 13, Gerald.

Q. Plaintiff's Exhibit No. 11.

A. That is the same track, the north track of the dock, looking west.

Q. Of the one that you crossed over?

A. Or looking east. Looking east.

Q. As counsel asked you, that is the track you crossed over?

A. Yes, that is the track I crossed over.

Q. Plaintiff's Exhibit 12.

A. That is looking west, the same track.

Q. The direction from which the cars came, is that right? A. That is correct.

Q. Looking west? [180]

A. That is looking west.

Mr. McKevitt: The building on the left is the ice plant?

A. The building on the left is the ice plant.

Q. (By Mr. Etter): And this area is where the things were dumped, is that correct?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. All right.

Mr. McKevitt: Who is the individual in the picture, Mr. Etter?

Mr. Etter: That is Mr. MacGillivray.

Q. Plaintiff's Exhibit No. 13.

A. That is looking west, the same picture of the track.

Q. It is a similar picture of the one just shown?

A. Yes.

Q. All right. And this is the ice dock that counsel referred to?

A. Yes, that is of the ice dock.

Q. And the track you went across?

A. That is the track.

Q. That is where the dump was?

A. Yes.

Q. All right. That is looking west, you said, didn't you? A. That is correct.

Q. Exhibit 14. [181]

A. That is looking east, the track north of the ice dock.

Q. I might ask you this, the tilted roof, is that of the ice dock, so that the jury can fix it?

A. Yes, of the house where you come up on to the ice dock.

Q. And this is looking east, where the others have been looking west, the last few?

A. Yes.

Q. No. 9, Plaintiff's Exhibit No. 9.

A. That is looking east on top of the ice dock.

(Testimony of Gerald Stintzi.)

Q. I might ask you, is that just outside of the door that was shown in the previous exhibit?

A. Yes, that is just outside of the door when you come up on to the dock.

Q. That is looking in what direction?

A. East.

Q. East. Plaintiff's Exhibit 15.

A. That is the farthest back picture, looking east at the ice dock and the track north of the ice dock.

Q. It is further back and it is the same picture as the other one, is that correct? A. It is.

Q. Of the tilted building as the beginning of the ice dock? A. Of the beginning of the ice dock.

Q. I see. And this pole here (indicating)? [182]

A. I don't know.

Q. All right. Plaintiff's Exhibit 16.

A. That is looking right at the salt pit and on top of the dock and the north rail.

Q. Now that is the picture that you explained yesterday as being a half shot of the east side of the building and a half shot of the west side, isn't that correct? A. That is correct.

Q. Pasted together, and ordinarily the track should be absolutely straight across there and the building straight and in perspective all the way?

A. Yes, east and west.

Q. And it is the same building and there is no curve or no corner otherwise?

A. There is no curve.

Q. And that is the salt dock, supposedly?

(Testimony of Gerald Stintzi.)

A. Yes.

Q. Is that correct? A. That is correct

Q. Gerald, would you mark an "X" which would indicate the doorway where you came out and then went across the track?

Have to have a better pen than that. That shows what a ball point does.

A. (Witness complies.) [183]

Mr. Cashatt: When you hold that up, Mr. Etter, you might just show where that makes it look like there is a corner there.

Mr. Etter: I might explain that this is a view, a half shot taken because of the limitation of distance in the back of one part of the shed; this is a view of the other part. That is one part; that is the other part. Putting them together gives that sort of a view in turn.

Mr. McKevitt: It is all a straight track.

Mr. Etter: It is all a straight track and, of course, there is no curvature or corner at all, even though there may appear to be there.

An "X" is marked there, which you will be able to see, which appears right here by my finger as being the entrance from which he came out the door. I will get up close so that you can see that. (Indicating to jury.)

All right, you take the stand.

(Witness resumes the stand.)

You may inquire, Mr. Cashatt. [184]

(Testimony of Gerald Stintzi.)

Cross Examination

Q. (By Mr. Cashatt): Mr. Stintzi, I believe you stated that you had worked at the Addison Miller plant at Yardley, Washington for about 5 days in 1952 before this accident occurred, is that right? A. That is right.

Q. Now in the year of 1951, Mr. Stintzi, I believe you worked at this same plant at Yardley, Washington for about three weeks, is that right?

A. Approximately.

Q. And during that time, Mr. Stintzi, in 1951, did you work in the ice plant itself?

A. Yes, I did.

Q. Now when we say "ice plant itself," we mean, oh, what is shown at the bottom of Defendant's Exhibit No. 1, is that right?

A. Where they make the ice.

Q. Where they make the ice, manufacture the ice? A. Yes.

Q. And in 1951, did you also work on the icing dock which we have been referring to here?

A. Yes.

Q. And during 1951, did you unload salt during 1951? A. Yes, I did. [185]

Q. Now when you came to work in 1951, Mr. Stintzi, when you had arrived there to go on shift, where did you report to?

A. To go to work?

Q. Yes, sir?

A. There was a little place, the house that is

(Testimony of Gerald Stintzi.)

right next to where we make the ice, manufacture the ice.

Q. In other words, you would come over to the ice plant itself, is that right? A. Yes.

Q. And you would go on shift at that location? A. Yes.

Q. Then, if your duties on a certain shift required that you go to the ice dock, how did you get over there?

A. We went to the long side to where they make the ice and there is a tunnel, we walked down the stairs and go through a tunnel, and then from there we go up to these stairs where they showed up in the picture, up on to the ice dock.

Q. In other words, you would come to the ice manufacturing plant, and then if it was necessary to go to the ice dock, you would go through the tunnel to the ice dock, is that right? A. Yes.

Q. Now you followed that same procedure in 1952, did you, [186] also? A. Yes.

Q. And during the year of 1951, how many occasions did you work up on the ice dock itself? Can you give us that generally? Would it be every day during this 3 week period, or twice a day, or what can you tell us about that?

A. Well, it was different intervals. Maybe one week we would work up on the ice dock all the time, and then maybe one day we would be in where they manufacture ice.

Q. And how many times during 1951 did you unload salt? A. I couldn't recall that.

(Testimony of Gerald Stintzi.)

Q. More than once?

A. It might have been; it might have been just once.

Q. During the year 1952, do you recall during that 5-day period if you unloaded any salt during that period of time?

A. In '52?

Q. Yes, sir?

A. Yes.

Q. Do you know how many times you did?

A. No, I don't. It might have been one or four times, I don't recall.

Q. Now on the 17th of July, 1952, the day of the accident, [187] Gerald, did you unload any salt that day?

A. We worked—I didn't unload salt, I was working by the pulley where they bring it up, up to the dock. There is a pulley in the salt pit.

Q. What time of the day did you work in the salt pit?

A. It was before lunch.

Q. And when you say "salt pit," do you mean the area where the salt is stored after being taken out of the boxcars?

A. Yes.

Q. And where it is lifted from the lower level up on to the dock, is that right?

A. Yes.

Q. Handing you, Mr. Stintzi, Plaintiff's Exhibit No. 8, which I believe you have seen—

A. Yes.

Q. —which I believe you said was a photograph taken on top of the icing dock looking to the west, is that right, sir?

A. That is correct.

Q. Now you had been up there in that location

(Testimony of Gerald Stintzi.)

on several occasions during your employment with Addison Miller, isn't that right? A. Yes.

Q. And when you are up on that icing dock, Mr. Stintzi, [188] you have a clear view across to the north, don't you? A. Yes.

Q. And you also have a clear view off to the south when you are up on the ice dock?

A. You probably would, I never noticed, I have just glanced all around.

Q. Well, now, when you were there before this accident happened on these various occasions, what did you see sitting on all of those tracks to the north and to the south?

A. There would be boxcars.

Q. And from the location on the ice dock, you had a pretty general view of the entire yard, isn't that right?

A. Well, I could just see boxcars all around, that's all I ever noticed.

Q. And gondola cars, tank cars, and so on and so forth?

A. All kinds and descriptions.

Q. All kinds of freight cars?

A. That is correct.

Q. And in Plaintiff's Exhibit No. 8, in that exhibit it shows boxcars sitting to the north and the south of the ice dock on various tracks, doesn't it, sir? A. Yes.

Q. And the same is true, isn't it, Mr. Stintzi, in Plaintiff's Exhibit No. 9? [189] A. Yes.

(Testimony of Gerald Stintzi.)

Q. That you can see boxcars and freight cars sitting—— A. Sure.

Q. ——in the various portions of the yard?

A. Sure.

Q. Now when you were there prior to this accident in 1951 and in 1952, tell us, Gerald, what noise you would hear, noises that you would hear, when you were up on that dock?

A. You mean talking?

Q. No, the general noise in the area, did you ever hear any general noise in that particular area? A. Never paid any attention.

Q. Did you ever hear boxcars being coupled together, freight?

A. Right around that area they might have, I just never noticed.

Q. Well, through 1951 and '52, Gerald, when you were working up on that dock, you saw switch engines working at various times, you saw that, didn't you?

A. What do you mean by switch engines working?

Q. Working, moving cars around, pushing them from one track to the other, and so on?

A. Yes, moving cars around, outside of some tracks.

Q. Well, you saw that was the general operation of the [190] entire yard there, you observed that, didn't you?

A. Well, I was just busy working, I just did my job.

(Testimony of Gerald Stintzi.)

Q. Well, at times, Mr. Stintzi, you saw switch engines bringing a string of freight cars up, saw them uncoupled, and saw those cars drift down the track; you saw that operation, too, didn't you?

A. No, I never saw any of that.

Q. Never saw that at all in 1951 or 1952 while you were working on the dock where you could look over this yard?

A. I never saw any drift. I would usually see cars that would be there and then the next minute I would maybe drop by there and there wouldn't be any boxcars there.

Q. Well, you knew, Mr. Stintzi, that that was the switching yard, didn't you?

A. That is what they call it, switching yard.

Q. And from what you observed there, you knew there was lots of activity at all times in that yard?

A. Well, there was activity.

Q. And now while you were there, Mr. Stintzi, working on the dock in 1951 and in 1952, you saw boxcars, gondola cars, freight cars, of all descriptions on Tracks 12 and 13; you observed that condition, didn't you?

A. Yes, they were connected to our icers.

Q. Well, you observed that condition, Mr. Stintzi, didn't [191] you, when freight cars in general weren't connected with the icers?

A. No, I didn't.

Q. Did you ever see them make up trains on Track No. 13?

A. No, I haven't, never saw that. When they

(Testimony of Gerald Stintzi.)

usually bring them in there, they would be icers.

Q. Well, on the night of July 17, 1952, the night of the accident, you saw stock cars on Track No. 13; you saw that?

A. The night of the 17th?

Q. Yes, sir.

A. Yes, but there were salt cars connected with them and that. There were always freight cars and that connected with icers and salt cars.

Q. Isn't it a fact, Mr. Stintzi, that when they brought a salt car in, that they brought that in singly without empty cattle cars and gondola cars?

A. They were connected with the salt cars.

Q. Did you ever see them bring a salt car in and put it on Track 13, either in 1951 or 1952?

A. No, when I got down there, they were always there, they were there.

Q. When they brought a salt car in, Mr. Stintzi, it was necessary that that salt car be spotted at a particular location, wasn't it? [192]

A. Yes, so we could open the doors to the salt pit and put the salt—take the salt out of the box-cars.

Q. Well, you knew, Mr. Stintzi, that they put freight cars of all descriptions on Track 13 and that they took them out of there; you knew that, didn't you?

A. Yes, with icers and salt cars. They were always connected.

Q. Never in the three weeks in 1951 or the five days in 1952, you had never seen during that pe-

(Testimony of Gerald Stintzi.)

riod of time general freight cars on that track without icers or salt cars?

A. No, I haven't.

Q. Now on this day, July 17, 1952, a fruit train was spotted on Tracks 12 and 13 about 4 o'clock in the afternoon, do you recall that?

A. July 17th?

Q. Yes, sir? A. I don't recall that.

Q. Well, about that time of the day, do you recall working on the dock icing a fruit train?

A. It has been so long ago, I might have, I might have been up there icing. We ice and go from one job to the other.

Q. Well, on that day, Mr. Stintzi, you came to work at about 3 o'clock, is that right? [193]

A. That is correct.

Q. And as soon as you came to work on that day, did you go over to the dock itself, that is, up to the icing dock?

A. Up on top of the dock, oh, yes, we went on top of the dock.

Q. And to the best of your recollection, what work did you do after arriving at the ice dock on July 17, '52?

A. We might have iced some cars and then pushed some salt around on top, and then we sit around for a bit and talk and that.

Q. You didn't unload any salt after coming to work at 3 o'clock in the afternoon on the 17th of July, 1952?

A. I don't remember. We might have in the

(Testimony of Gerald Stintzi.)

afternoon, because the afternoon, the morning, was so close together that I just can't put them apart. It has been so long.

Q. Well, Gerald, do you remember what time you went to lunch on that afternoon?

A. No, I don't. We have our lunch set that when there is a car comes in, if we don't have anything to do, he tells us, "We'll go down and have our lunch."

Q. So you reached a time in that afternoon or that evening when you didn't have any work at the dock, is that right? [194]

A. When he asked—on July 17th in the afternoon?

Q. Yes, that's right.

A. Yes, we were sitting around talking and just for awhile. At that time when he chose us, we were up on the dock all together.

Q. Now, then, you did go to lunch, though?

A. Oh, yes, we went to lunch.

Q. And as near as you can remember, Gerald, about what time would you say that was?

A. I couldn't give any time, I wouldn't know what time.

Q. And when you went to lunch, Gerald, the entire crew went over at one time, didn't they, from the ice dock to the ice house?

A. Sometimes the entire crew, some were left there. Just when he said lunch, the ones that wanted to go to lunch, they went downstairs, most of them did.

(Testimony of Gerald Stintzi.)

Q. And on this particular day, Gerald, the 17th of July, '52, isn't it a fact that the entire crew, after they finished icing the fruit train, went over to the ice house from the ice dock through the tunnel for lunch?

A. Yes, sometimes not the entire crew, though.

Q. Well, I wasn't saying sometimes; maybe you misunderstood me.

A. Oh, excuse me.

Q. My question was confined to the 17th day of July, '52. [195] Do you understand that now?

A. Yes, I couldn't remember, I might say they all went over and they may not have, some of them might have stayed up on the dock.

Q. Well, in any event, yourself, Allan Maine, Ray Davis, Joe Vallarano, the ones that later were working on taking out the slush ice, they all went over at one time for lunch, didn't they?

A. Oh, yes, we went over and had lunch.

Q. And I believe the foreman out there, Foreman Fincher, didn't he go over and have lunch at the same time?

A. I never noticed.

Q. You don't remember?

A. I don't remember.

Q. Well, then, following your lunch, Gerald, didn't Foreman Fincher and the rest of the crew all come back in a body to the ice dock?

A. Yes, up on top.

Q. And there were about 7 or 8 in that particular crew that came back with you after lunch from the ice house to the ice dock, isn't that right?

A. Yes, there was a group of us that came back.

(Testimony of Gerald Stintzi.)

I wouldn't know who, but a group of us came back up on to the ice dock.

Q. Yesterday, Gerald, you mentioned there was a crew of [196] about 20. By that you meant the ones working at the ice plant and the ones working at the ice dock, also, didn't you?

A. I said approximately and I meant the ones up on top of the dock and around, down in the salt pit and that.

Q. After you had completed your lunch and came back through the tunnel with Foreman Fincher, isn't that right?

A. I never noticed Fincher until I was up on top.

Q. I see. Well, then, to the best of your recollection, you do remember talking with the Addison Miller foreman on top of the icing dock, is that right?

A. After lunch, yes.

Q. And is that the time, Gerald, when you say that he gave you the instruction concerning this work in taking out the slush ice?

A. Yes. We might have iced some cars or did some other little jobs, but a little later after lunch, that is when he gave us our instructions.

The Court: Recess for 10 minutes.

(Whereupon, a short recess was taken.)

The Court: All right, proceed.

Q. Now, Mr. Stintzi, before recess you told us that when you came to work, you came to the place where they [197] made the ice itself, that is, when you came to work for any shift?

A. Yes.

(Testimony of Gerald Stintzi.)

Q. And when you went from the ice manufacturing plant to the ice dock, you went through the tunnel? A. That is correct.

Q. Now when you iced cars at the dock, Mr. Stintzi, that was done on top of the dock, wasn't it?

A. Yes.

Q. And in doing that, you weren't on the ground or you weren't going between any cars, were you?

A. No, we worked from the dock on to the box-car.

Q. And in coming from the ice manufacturing plant to the ice dock, you never crossed any rails or any tracks in doing that, did you? A. No.

Q. That tunnel was underneath the tracks, wasn't it? A. Yes, it was.

Q. And when you unloaded salt, Mr. Stintzi, you did that between the boxcar and the salt pit, is that right? A. Yes, that is correct.

Q. And in doing that, you weren't down on the ground at any time, were you?

A. No, we worked from the box car across the platform into the salt pit. [198]

Q. And you weren't on the rails themselves or you weren't between any cars or between any couplers, were you? A. No.

Q. And now when you went to lunch, Gerald, were there cars on Track 13 at that time?

A. I don't remember.

Q. Were there cars on Track 12 at that time?

A. I don't remember.

Q. When you came back from lunch, Gerald,

(Testimony of Gerald Stintzi.)

were there any cars on Track 12, that is, the track south of the ice dock?

A. There might have been, I wouldn't know. I don't remember, but there might have been.

Q. You don't remember? A. No, I don't.

Q. You can't say whether there were or whether there weren't, is that right?

A. No, I couldn't, I couldn't.

Q. Well, now, when you came back from lunch and when you were up on the dock, did you see any cars on Track 13, any freight cars?

A. I might have and I have have iced some, I don't remember.

Q. Your answer to that question would be that you don't remember? [199]

A. That is right.

Q. Now when you came back to the dock, you say you were up on the dock when your foreman, Mr. Fincher, told you to go down and work and take out slush ice? A. That is correct.

Q. Did he tell you what to use to take that out?

A. He might have, he might have said there was a bucket, but I don't remember. There was so much discussion, I don't remember.

Q. Where did you get the bucket?

A. I don't remember. It might have been down there, I don't remember.

Q. Well, now, did Fincher, Foreman Fincher, go down with you? A. No, he didn't.

Q. Did you know where it was that you were supposed to work? A. Yes.

(Testimony of Gerald Stintzi.)

Q. How did you know that?

A. He said near the pulley where the ice was caked up, and it is downstairs where they were having trouble, and so—then he said to go down there, and so on.

Q. You had come past that location, had you, when you came through the tunnel after lunch?

A. Yes. [200]

Q. And that is how you happened to know where to go to carry out this work, is that right?

A. Yes.

Q. Now you hadn't carried out any slush ice during that 5-day period in 1952 before this date you have been telling us about?

A. No, I didn't.

Q. And you hadn't carried out any slush ice during the year of 1951 when you were working there in that 3-week period? A. No, I didn't.

Q. July 17, 1952 was the first time that you had ever carried out any slush ice? A. Yes.

Q. Is that right? A. That is correct.

Q. Then when you went down there from the top of the dock to this location where the slush ice was, I believe you stated that one of the crew filled the bucket, is that right?

A. Yes, one or two, I don't remember, one or two.

Q. One or two. And then helped pass it to another who carried it outside, did they?

A. Yes.

Q. And then the one that carried it outside

(Testimony of Gerald Stintzi.)

would give [201] it to you and Allan Maine, is that right?

A. We would take the bucket while we were inside, but as soon as we got up to the top, then we would take it.

Q. I see. In other words, you mean when you were on ground level you took it, is that right?

A. That is correct.

Q. And would carry it out the door?

A. Yes.

Q. And after you went down there, a few buckets had been filled, and you and Allan Maine had gone through this procedure you told us about, going over to the car and putting the bucket under the coupling and you crawling under the coupling?

A. That is correct.

Q. Now you say, Gerald, that that was about how far from the door where you were taking the ice out? A. To where we dumped it?

Q. Well, before you crossed the track?

A. Oh, approximately 10 feet, 9 feet, something like that.

Q. Not more than 10 feet from the door itself, is that right?

A. It might have been either way, one way or the other, but I don't think so.

Q. And in what direction from the door where you came out? [202]

A. We went toward the west.

Q. Toward the west? A. Yes.

Q. And I believe after you had carried out 3 or

(Testimony of Gerald Stintzi.)

4 buckets or so, you looked to the east and saw the men working at the salt car, is that right?

A. Yes, I did.

Q. You had carried out, Gerald, about, oh, several buckets before you noticed anybody working at the salt car?

A. No, it was the first or second, the first or second.

Q. But you had taken buckets of slush ice and crawled under the couplings and dumped it across the track before you saw anybody else in that area?

A. I think we noticed them first, because we—I looked both ways, just a precaution, a natural precaution, looked both ways.

Q. Now, Gerald, do you remember when your deposition was taken when you were at Mr. Etter's office, Mr. MacGillivray and myself—

A. Yes.

Q. —and Mr. McKevitt were present?

A. Yes.

Q. And Mr. Oden, the court reporter here, was there and took down the questions and answers?

A. That is correct. [203]

Q. And when you were sworn on oath, just as you are now? A. Yes.

Q. And, Gerald, were you asked—Page 29—were you asked the following questions and did you give the following answers:

“Well, when you first got down, before you carried out any buckets or anything, did you look down to see them unloading salt at that time?”

(Testimony of Gerald Stintzi.)

Your answer: "No, I didn't look down there."

Question: "Well, how many buckets, possibly, had you carried of ice before you noticed this work with the salt that was going on to the east?"

Answer: "I don't know, I was just carrying back and forth, talking between us, and then looked up there and see some of them working. When I saw them, I thought, well, just every-day occurrence, you know, crew is out there working, that's all."

I will just follow along:

Question: "Any idea how many was in the crew?"

Answer: "No, no, because there was some in the boxcar, probably some in the house." [204]

"Question: "While you were carrying the buckets out, did you ever walk down to where they were unloading the salt?"

Answer: "No, no."

And on Page 28, counsel:

Question: "Were they unloading salt there when you came down from the loading dock?"

Answer: "I did not notice."

Question: "When did you first notice them unloading salt?"

Answer: "I took a look down there—I took a look and I knew they were unloading salt somewhere, but I didn't know where. Then I looked down there and they were unloading."

"Question: "Who was down there unloading salt, do you know?"

(Testimony of Gerald Stintzi.)

Answer: "I only had one friend that was working down there. That was 'Idaho' Davis."

"Question: "Was he unloading salt?"

Answer: "To my recollection, he was."

Question: "And do you know anybody else that was in the crew that was unloading salt?"

Answer: "No, no."

Were you asked those questions at that time, Gerald, and did you give those answers? [205]

A. Yes, I did. That was in the deposition.

Q. Now how many cars, Gerald, were there to the east of this door that you were coming out with the slush ice?

A. To the east?

Q. To the east, yes, sir?

A. I couldn't notice because they were going back and forth on that plank.

Q. At any time, did you walk down to the east to see how many cars there were there?

A. No, I didn't.

Q. At any time, did you walk down past the salt house and see the open area which was 300 feet in length under the dock? Did you walk down and see that?

A. No, I didn't.

Q. At any time, did you walk any further to the west than the 10 feet that you have told us about where you were going under the couplings of the cars?

A. No, I didn't.

Q. Did you look and see the area to the west which was open past, say, this 10 foot distance where this slush ice could have been dumped?

A. Could you repeat that again, please?

(Testimony of Gerald Stintzi.)

Q. I will. Did you look to the west to see an area on the south side of Truck 13, an area where you could have dumped the ice without going across Track 13? [206] A. No, I didn't.

Q. You could have dumped the ice either to the west or to the east without going across Track 13; now, you could have done that, couldn't you, Gerald? A. I never noticed.

Q. These two cars that you were going between, which you say were 9 or 10 feet to the west of the door you were coming out of, those were two cattle cars or stock cars, isn't that right?

A. I never noticed.

Q. You didn't notice? A. No, I didn't.

Q. Well, you walked right alongside of the car, Gerald, in order to get to that location 10 feet west of the door you were coming out? A. Yes.

Q. Didn't you?

A. But I might say there was a cattle car or a freight car and I might be wrong, which I don't remember.

Q. The two cars, Gerald, that you were going between, under the couplers, those two cars were joined together at the couplers, weren't they?

A. They were.

Q. What I mean by that, they were hooked right one to the other, weren't they? [207]

A. Yes, they were connected together.

Q. Now if you had gone to the east, was there anything stopping you from going to the east with this slush ice?

(Testimony of Gerald Stintzi.)

A. The men working back and forth on that plank.

Q. And how high was that platform from the ground?

A. I wouldn't know how many feet.

Q. Well, would you say that came from a box-car to the salt house? A. Yes.

Q. And would that be about as high as is shown in Exhibit No. 16?

A. Right in here, right here and there (indicating).

Q. It would be about up to the door, as shown in Exhibit No. 16, is that right?

A. Yes, that is correct.

Q. And that would be about 45 inches, wouldn't it, Gerald, as near as you could estimate it?

A. I wouldn't know how many inches. I'm not too good on inches.

Q. Well, the couplings you were going under, Gerald, were about 30 inches from the ground to the coupling, isn't that right?

A. I wouldn't know how far they were.

Q. And at that same location, Gerald, besides the coupling [208] itself, there was an air hose hanging down there, wasn't there?

A. There wasn't one hanging low, it was connected some way with the couplings.

Q. Wouldn't it have been easier to go under the platform that the men were unloading the salt from then it would have been to go under the coupling, as you did, Gerald?

(Testimony of Gerald Stintzi.)

A. No, because we probably would have to carry that big bucket under those and then we probably have to still go across the track.

Q. Well, you could have dumped the ice under the 300 foot platform that was there, couldn't you?

A. We were following our foreman's instructions.

Q. Your foreman didn't tell you to go between those cars, did he?

A. He said to go across the track.

Q. But he didn't tell you to crawl under the couplings, did he?

A. Well, we couldn't walk down the west end because we would have just—we just couldn't have carried that big bucket clear around there.

Q. Well, you wouldn't have had to have gone very much farther to the west to come to an open space where this ice could have been dumped?

A. I never noticed on the west because they were going [209] back and forth on that platform.

Q. And which one of these doors as shown on Exhibit No. 16 was it that you say that the salt was being unloaded?

A. I don't know which window that was being unloaded, I didn't know which one. It might have been this one or that one (indicating), I wouldn't know which one.

Q. Well, you have marked on Exhibit No. 16, Gerald, the location where you were coming out with the slush ice? A. That is correct.

Q. Out of the door. But is it your testimony

(Testimony of Gerald Stintzi.)

that you are unable to tell us which one of these openings, the two openings shown on Exhibit No. 16, that they were unloading salt into?

A. Yes, I just noticed them going back and forth.

Q. Now isn't it a fact, Gerald, that when salt is unloaded, that the entire crew is put on that operation?

A. Taking salt from the boxcar into——

Q. Taking salt from the boxcar and putting it into the salt house?

A. Sometimes it wasn't the whole crew, it would be just parts.

Q. When a salt car is put on that track, everything that is possible to be done is done to get it unloaded as soon as possible, isn't it?

A. That is correct. [210]

Q. Because as long as the salt car is on that track, the track is tied up, isn't it?

A. Yes, we want to get the salt in so we can distribute it.

Q. And so, then, when a salt car is unloaded, the entire crew is put on that job, isn't it?

A. No, sometimes we have icers and some stay up and ice and some go down in the salt deal.

Q. Well, now, Gerald, you don't mean to say that they unload a boxcar of salt into that salt pit and while they are doing that they are also hoisting the salt up to the dock?

Mr. MacGillivray: Objected to as argumentative, your Honor.

(Testimony of Gerald Stintzi.)

The Court: Overruled, he may answer.

Mr. Cashatt: Understand the question?

A. Yes. Well, lots of times we never used the hoist, we just piled it inside of the house.

Q. Yes. A. For later use.

Q. It is taken out of the boxcar? A. Yes.

Q. And then piled in the salt house?

A. That is correct.

Q. And then when it is needed at a later time, it is hoisted from the salt house up to the dock itself? [211] A. That is correct.

Q. And that was the usual procedure, wasn't it?

A. Yes.

Q. Now isn't it a fact, Gerald, that on this night of July 17, 1952, that the only salt operation that was going on at that time was the hoisting of salt from the pit up to the dock up above?

A. Before or after lunch?

Q. Oh, no, at the time you were taking out the slush ice?

A. I wouldn't know, they might have been going back and forth, I wouldn't know. They might have been piling it in there, I wouldn't know.

Q. Well, now, Gerald, you say that they might have been going back and forth?

A. I mean, you know, the pulley going up to the dock level, they might have not been using it, just piling to get it in, to get the salt out of the boxcar.

Q. Well, now, who was working over there at that time?

(Testimony of Gerald Stintzi.)

A. Where they were unloading salt?

Q. Yes? A. "Idaho."

Q. Was he unloading salt?

A. He was working in the salt operation of unloading it.

Q. Isn't it a fact that Ray Davis or "Idaho" Davis, as you call him, was in the salt pit with a man by the name of [212] George Stahl and that they were hoisting, working the jig, that takes the salt up to the top of the ice house?

A. I couldn't see around there because I was never down there.

Q. By the way, at the time this accident happened, just at that time, it was dusk, wasn't it?

A. I never noticed. It might have been dusk, I wouldn't know.

Q. It was getting dark?

A. We could see.

Q. You could see, but it was getting dark, wasn't it?

A. I wouldn't know. It might be getting dusk, I wouldn't know.

Q. Well, did you see any lights from the ice dock into the salt car? A. Never noticed.

Q. Did you look? A. No, I didn't.

Q. You say there were men going back and forth from a salt car to the salt house?

A. Yes.

Q. And they had no lights around the boxcar or around the platform that they were walking on?

A. I never noticed. [213]

(Testimony of Gerald Stintzi.)

Q. Well, now, you knew, Gerald, that they moved cars in and out on that track at all times, didn't you? On 13?

A. On which way do you mean?

Q. That they put cars in on that track, that they made up trains there, and that they moved the cars off of the track?

A. When we finished a job, they took it away.

Q. You didn't know anything about the communication system between Addison Miller and Northern Pacific?

A. None whatsoever.

Q. You didn't know what the system was to put the cars in nor take the cars out?

A. No, I just knew they come in and went out.

Q. And you knew nothing about the blue light arrangement?

A. No, I didn't.

Q. Between Addison Miller; that Addison Miller was supposed to put the blue light on Track 13 or on Track 12 when work was going on on the track; you didn't know anything about that?

A. No, I didn't.

Q. Well, now, Gerald, if you didn't know anything about the communication system between Addison Miller and Northern Pacific, didn't know about the blue light, how did you get the idea that the cars were frozen on Track 13? [214]

A. Oh, because when we were icing cars or taking salt from the boxcar to the salt pit, we always just knew that they would be frozen there; they wouldn't throw in a bunch of cars and endanger our lives, because I never saw it done.

(Testimony of Gerald Stintzi.)

Mr. Etter: What was the last part of that answer? A. I never saw it done.

Q. (By Mr. Cashatt): What do you mean by "frozen?"

A. Staying right there while we are working, not shooting any cars or bumping cars, as you say, into the other cars.

Q. You knew that track belonged to the Northern Pacific Railroad, you knew that Track 13 belonged to them?

A. I never knew, just railroad tracks. I didn't ask around if they were railroad or Northern Pacific or——

Mr. Cashatt: May I take a second, your Honor, to see if I have anything else?

The Court: All right.

Q. (By Mr. Cashatt): You knew, Gerald, that you were working for Addison Miller?

A. Yes.

Q. And that you were not working for Northern Pacific? A. That is correct.

Q. Gerald, you testified, I believe, that you had worked on construction work? [215]

A. Yes, I have.

Q. And had worked as a mucker?

A. Yes.

Q. And had worked as trucker, also?

A. Yes.

Q. And that you had done that for some years before this accident occurred? A. Yes.

(Testimony of Gerald Stintzi.)

Q. And you knew and appreciated the dangers connected with all those occupations, didn't you?

A. I didn't appreciate the dangers, no.

Q. Well, you knew it was dangerous to go under the couplings of two cattle cars that were sitting on a switch track in a railroad company's yard, you knew that?

A. Just as I would going across the street.

Q. Gerald, isn't there a little difference between going across the street and between crawling under the couplers of two railroad cars?

A. Yes, but when there has never been anything happen like that, people bumping cars into cars, just frozen when they were working there and under that, that is, we thought that, all of the workers around there.

Mr. Cashatt: I move that last part be stricken.

Mr. Etter: It is responsive.

Mr. Cashatt: All of it. [216]

Q. Isn't it a fact, Gerald, that when you were taking these buckets of ice out of the door, and so on, that Allan Maine suggested to you that you dump it south of Track 13, that you dump it between the ice dock and Track 13?

A. I don't remember of him saying that.

Q. You never heard him suggest that to you?

A. I don't remember.

Q. Would you say that he didn't suggest that to you? A. I wouldn't know either way.

Q. Your plans, Gerald, at the present time you plan on going to school, do you?

(Testimony of Gerald Stintzi.)

A. Yes, I do.

Q. And what type of school? I mean, what do you plan on taking in school?

A. I'll probably end up taking law.

Q. Are you going to start this fall?

A. Yes.

Mr. MacGillivray: Might change his mind, though, after this.

Mr. Cashatt: That is all.

The Court: Redirect? [217]

Redirect Examination

Q. (By Mr. Etter): Gerald, the night that you were injured, you told Mr. Cashatt that you didn't know anything about the blue lights of Addison Miller. Had you ever been told anything about them? A. No.

Mr. Cashatt: I object to that, your Honor.

Mr. Etter: What ground?

The Court: Overruled.

Q. (By Mr. Etter): Had you ever been told anything about their telephone system?

A. No.

Q. That there was a telephone between the yardmaster's office and the Addison Miller dock?

A. No.

Q. Had you ever been told there was a loud-speaker system right out there where you were working? A. No.

Q. Connected with the yardmaster's office?

A. No.

(Testimony of Gerald Stintzi.)

Q. Never been told any of that, is that correct?

A. No, that is correct.

Q. Well, did you receive any warning of any kind, loudspeaker or anything else that Mr. Cashatt has inquired [218] about, of the approach of any cars or switching movement on Track 13 the night you were hurt? A. No.

Q. Now this place that you were dumping, Gerald, north of the track the slush ice that you have referred to and the area which has been identified by you in several exhibits, I am referring now particularly to Exhibit No. 12, you will note the area to which I refer? A. Yes.

Q. Can you tell us whether to your knowledge these salt sacks of Addison Miller were dumped over there on many occasions?

Mr. Cashatt: I object to that, your Honor, not proper redirect.

The Court: I think it is repetition.

Mr. Cashatt: Repetition.

Mr. Etter: Beg your pardon?

The Court: I think it is repetition, but he may answer. I think he has testified to that before.

A. Well, when they unloaded salt, they always threw the bags over there, just everything that you didn't want you threw over there.

Q. (By Mr. Etter): Well, I am going to ask you whether or not as to this area, whether you ever saw anybody going across this railroad track to dump sacks over there in [219] that area?

A. I never noticed.

(Testimony of Gerald Stintzi.)

Q. You never noticed. Have you seen sacks in this area?

A. Oh, yes. It is always full.

Q. You testified that you had instructions to take the ice north of Track 13, is that correct?

A. That is correct.

Q. You were told to dump it there?

A. Yes, correct, across the track.

Q. And your foreman, Mr. Fincher, gave you those instructions? A. That is correct.

Q. Now, Gerry, counsel inquired about you going to work in the morning and stated that you usually or nearly always checked in or else you went to work from this area where they manufacture the ice? A. Yes, that is where we met.

Q. That's right. And you told counsel that there was a tunnel that went down through here over to the shed? A. That is correct.

Q. And that that was for your use and you would use, isn't that correct?

A. Yes, that is correct.

Q. And that led into the tunnel shed and, of course, put you on the immediate premises of the Addison Miller [220] property, isn't that right?

A. That is correct.

Q. Now on this tunnel shed, you have identified these pictures which are exhibits of the interior of the tunnel shed, have you not? A. Yes.

Q. And the sump where this chipped ice would fall or the one that you were cleaning out?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Was there any place in the tunnel, that is, going over here (indicating), to dump that chipped ice? A. No.

Q. Was there any place in the tunnel shed around any place to dump the ice?

A. I never saw any.

Q. Beg your pardon?

A. I never saw any.

Q. But in the tunnel shed itself, Gerald, referring to Exhibit No. 7, isn't that an open door right from the tunnel shed on the railroad yard level?

A. Yes, that is coming right out.

Q. Yes, on the railroad yard level, is that correct? A. That is correct.

Q. That door was open, isn't that right?

A. That is correct. [221]

Q. And that opens on to the railroad property?

A. That is correct.

Q. It was within about 4 feet of the rails, that is, of the first rails? A. Four or five feet.

Q. Four or five feet. Was there any way for you to dump the ice north of the track without coming out that door?

A. That was the only way.

Q. That was the only entrance, other than going down back from the tunnel and across over here to the ice house, isn't that correct?

A. That is correct, that is correct.

Q. And that is the doorway that you used?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Is that right? A. That is correct.

Q. And north of the tracks would be north of the first track as you come out the door?

A. Yes.

Q. What was the situation when you were taking this ice out, Gerry, with respect to the number of cars that were to your west?

A. I looked——

Mr. Cashatt: I object, your Honor, it is repetition.

The Court: I beg pardon? [222]

Mr. Cashatt: It is repetition.

The Court: Well, I think it is. I don't know that he has been asked exactly the number. He may answer.

Q. (By Mr. Etter): If you know?

A. I wouldn't know the number.

Q. Could you tell us whether or not there were three or four to the east?

Mr. Cashatt: Object to that as leading, your Honor. This line has been very leading, I haven't objected.

The Court: I think that is leading, I will sustain the objection.

Mr. Etter: All right, withdraw it.

Q. Gerry, you have testified in your direct examination that there were about between 20 and 25 or possible a few more or a few less in the crew that worked there on shift?

A. That is correct.

Q. Did you ever see that crew of 20 or 25 or a

(Testimony of Gerald Stintzi.)

few more or a few less all working unloading one boxcar of salt at the same time?

A. No, they couldn't get them all in the boxcar.

Q. You never saw that? A. No.

Mr. Etter: That is all.

The Court: Any other questions? [223]

Mr. Cashatt: Just one or two, your Honor.

Recross Examination

Q. (By Mr. Cashatt): Counsel showed you Exhibit No. 12, Mr. Stintzi, and asked you a question in regard to seeing salt sacks across the track there. Isn't it a fact that they bring in whole lines of boxcars on that Track 14 and that they clean them out on that particular track and dump it in between 13 and 14? A. What kind of cars?

Q. All kinds, boxcars, cattle cars, and all types of cars?

A. The only cars I ever saw was salt cars. We did that ourself.

Q. Maybe you don't understand my question. Look at Exhibit No. 12, Mr. Stintzi.

A. Yes.

Q. You see debris of all kinds running way to the west of the ice dock, don't you?

A. That is correct.

Q. And if we had another picture following on down the other way, there would be debris between Tracks 13 and 14 running for a considerable distance to the east, wouldn't there? [224]

A. Yes.

(Testimony of Gerald Stintzi.)

Q. And my question was, isn't it a fact that the Northern Pacific uses Track 14 for a clean-out track where they clean out the dirty cars and they dump that between Tracks 13 and 14?

A. I never noticed that.

Q. You have never seen that? A. No.

Q. But you had seen debris a way to the west of the ice dock and way to the east of the ice dock?

A. Yes.

Q. Between those two tracks, hadn't you?

A. Yes.

Q. Now in regard to the tunnel, there was nothing to prohibit you, Mr. Stintzi, from going back through the tunnel, taking the ice out in the opposite direction that you actually were doing it?

A. The tunnel wasn't big enough for two men and a bucket to go through.

Q. The tunnel, you walk through it satisfactorily?

A. Yes, you could walk through, a person.

Q. And arrangements could have been made to take that slush ice out back through the tunnel, isn't that right? A. I don't think so, no.

Mr. Cashatt: That is all. [225]

Mr. Etter: That is all.

The Court: That is all, then, Mr. Stintzi.

(Witness excused.)

It is almost time to recess. I will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 p.m., this date.) [226]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Proceed.

Mr. MacGillivray: Mr. Maine.

ALLAN MAINE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your name is Allan Maine? A. Yes.

Q. Where do you live, Allan?

A. East 3634 Queen.

Q. Allan, will you keep your voice up so we can hear you back here?

A. East 3634 Queen.

Q. And with whom do you live?

A. My parents.

Q. How old are you, Allan? A. 18. [227]

Q. And do you go to school? A. Yes.

Q. Where? A. Rogers.

Q. At Rogers High School? A. Yes.

Q. In what grade are you? A. Senior.

Q. You will be a senior next year?

A. Yes.

Q. How long have you known Gerry Stintzi, Allan?

A. Well, it was when I was a freshman, first year of high.

(Testimony of Allan Maine.)

Q. Were you and Gerry in the same grade?

A. No.

Q. Was he ahead of you?

A. One year, yes.

Q. So you knew Gerry before he was hurt and you have known him since he was hurt?

A. Yes.

Q. Now, Allan, do you recall that Gerry was injured out at Parkwater on July 17, 1952?

A. Yes.

Q. Were you employed by Addison Miller Company at that time? A. Yes, I was. [228]

Q. How long had you worked for Addison Miller before Gerry was hurt?

A. About five days.

Q. When is your birthday?

A. March 31st.

Q. So that at the time Gerry was injured, you were 16? A. Correct.

Q. Now during this 5 days you worked out there, what shift did you work, different shifts or the same shift? A. No, I worked swing.

Q. Is that the shift from 3 to 11?

A. Yes.

Q. Did you know how many shifts they ran out there at the icing dock?

A. Three, I imagine.

Q. In other words, they had a crew out there around the clock so far as you knew?

A. Yes.

(Testimony of Allan Maine.)

Q. Now during this 5 days before Gerry was injured, what type of work did you do?

A. Iced cars and emptied salt and, when the accident occurred, carrying out slush.

Mr. McKevitt: Didn't hear that?

The Court: You will have to speak up just a little louder. [229]

Q. (By Mr. MacGillivray): Did you work in the ice plant itself during that 5 days?

A. No.

Q. All of your work was either icing cars or emptying salt from cars into the salt pit?

A. Yes.

Q. Now when you are icing cars, Allan, are you working on the dock or on the cars or both places?

A. Well, you work on the dock and you work on top of the cars, both.

Q. And those would be cars spotted on the two tracks, the track south of the icing dock and the track north? A. Yes.

Q. Then in the salting operation, how often had you done that, do you know?

A. Every time you would ice a car you would have to salt.

Q. Well, I mean carrying salt out of boxcars into the salt pit, had you done that?

A. Yes, I have.

Q. How many times had you done that?

A. I don't remember.

Q. And as I understand, Allan, when you do that

(Testimony of Allan Maine.)

work, you work in the boxcar itself and from the boxcar across a platform into the salt pit?

A. Yes. [230]

Q. Now on the evening that Gerry was injured, was that before you had your supper or after?

A. After.

Q. What time had you come to work that day?

A. 3 p.m.

Q. Do you recall what time you went to supper, approximately?

A. Well, it was so long ago, it was around—oh, I couldn't say. We did some—

Q. Well, 6, 7 o'clock, 8 o'clock, or 5 o'clock?

A. Well, it was around 6 or 7, something like that.

Q. 6 or 7? A. Yes.

Q. And how long did you boys usually take for supper?

A. Well, you couldn't be away too long, about—oh, we weren't gone from the plant but about 15 minutes.

Q. About 15 minutes? A. Yes.

Q. Do you recall what you had done that day, July 17, 1952, between 3 o'clock when you came to work and the time you went to supper?

A. No, I don't.

Q. Well, do you recall whether you had iced cars or emptied salt or what?

A. Well, I—I can remember doing something, but I know we [231] were up on the dock doing

(Testimony of Allan Maine.)

something. It may have been icing cars, I don't remember.

Q. Well, you do know that you were working between 3 o'clock and the time you went to supper?

A. Yes.

Q. Then where did you have your supper?

A. Well, we went over to the Dairy Queen over on Trent.

Mr. McKevitt: Over where?

The Court: To the Dairy Queen, is that what you said?

A. Yes, the Dairy Queen, and got us a milk shake and a hamburger, and then went right back in the car and back to the plant where we ate.

Q. (By Mr. MacGillivray): In other words, you left the ice dock, went through the tunnel over to the ice plant, then took the car and went over to the Dairy Queen? A. That's right.

Q. Had a sandwich and a milk shake and came right back? A. Yes.

Q. Who had supper with you?

A. Gerry and Idaho, I'm pretty sure.

Q. Who is Idaho?

A. He is a friend of Gerry's and I that was working with us.

Q. Where had you known Idaho? [232]

A. From school. I didn't know him well at the time, but I knew him.

Q. Did he go to Rogers? A. Yes.

Q. Is he the Idaho Davis that was a halfback

(Testimony of Allan Maine.)

at Rogers the last couple of years on the football team? A. Pardon?

Q. He was the Idaho Davis that is on the football team out at Rogers? A. Yes.

Q. Then after you got back to the ice plant from the Dairy Queen, what did you three boys do then?

A. We ate and listened to the car radio, and then our foreman or someone ordered us to go over to the dock and we had this work to do.

Q. And did you go back through the tunnel?

A. Yes.

Q. And up on to the dock? A. Yes.

Q. Then when you got to the dock, do you recall Mr. Fincher, the foreman—— A. Pardon.

Q. Do you recall Mr. Fincher, the foreman for Addison Miller? A. Yes. [233]

Q. When you got back through the tunnel and up on to the dock, did Mr. Fincher instruct you to do certain work? A. Yes.

Q. What work was that?

A. To empty the slush out of the pit or wherever——

Q. Had you ever done that work before?

A. No, I never.

Q. Did you know where the slush pit was?

A. Yes.

Q. And just what instructions did Fincher give you boys as to emptying this slush ice?

A. We were supposed to take the ice out—I don't remember just the words he said, but it was

(Testimony of Allan Maine.)

to take the ice out and take it over on the north side of the tracks and dump it.

Q. And what track were you referring to?

A. The north, outside of the—as you come up the stairs, it would have been north of the door.

Q. That is, the first track north of the icing dock?

A. Yes.

Q. And was Mr. Fincher very definite in his instruction that you dump it north of that track?

A. Yes.

Mr. McKevitt: Object to the form of that question.

The Court: It is a leading question, I believe.

Mr. McKevitt: Leading and suggestive.

Q. (By Mr. MacGillivray): Well, after Fincher gave you those instructions, who went down to the slush pit with you?

A. Gerry and Joe Vallarano and some Canadian, I don't know what his name is, and myself.

Q. Was his name John, do you recall?

A. Yes, his first name is John, but I don't know him.

Q. He was a Canadian?

A. Yes.

Q. Then when you got down to the slush pit, what went on, what did you do? What did Gerry do and what did Joe do and what did John do?

A. Well, Gerry and I were the first to carry it out, and I think John shoveled and put it in the bucket and Vallarano handed it up a little bit across and then we carried it out.

Q. How big a bucket was it?

(Testimony of Allan Maine.)

A. It was a fairly large bucket.

Q. Do you know what that bucket weighed full of ice?

A. Must have been quite a bit because it took both of us to carry it.

Q. Was it all that two of you could do to carry that bucketfull of ice?

A. Well, one can manage, but it really took a lot of [235] effort. I mean, it took a lot of effort with both of us to do it.

Q. I see. Then did you and Gerry carry the first bucket out, do you recall? A. Yes.

Q. Then when you got out the doorway and faced the track, what was on the track?

A. A train, the boxcars.

Q. Do you know how many cars?

A. Not right offhand, I couldn't say.

Q. Well, Allan, did you look down to the west to see how far the cars extended?

A. Yes, I did.

Q. Do you know how far they extended down to the west?

A. Well, I couldn't see the end of them, but as far as you could see, I imagine. It was dark between the building and the train, I imagine, so I really couldn't say where the end of it was.

Q. Do you remember about what time of night this was when you got down to the slush pit?

A. Approximately 7:30 or 8 or around there.

Q. And was it dark outside or getting dark or just what?

(Testimony of Allan Maine.)

A. Well, it was light enough to see what you were doing, but it was just—I mean, it was starting—I mean, it was just after it started to get dark. [236]

Q. In other words, it wasn't daylight?

A. No.

Q. It was starting to get dark?

A. It was dusk, you might say.

Q. Then when you took that first bucket out, did you look down to the east between the icing dock and the cars on the track?

A. On the east?

Q. Yes, look down the track to the east?

A. Well, there was a platform between the train, there was a salt car and then there was the salt house and there was a platform between there, and I don't know, I never noticed down that far. I mean, they were just working around there.

Q. Do you know how far the railroad cars extended down to the east from where you came out of the doorway?

A. Quite a bit, I imagine.

Mr. McKevitt: Pardon?

A. Quite a bit of distance, if I guess right. I wouldn't know for sure.

Q. (By Mr. MacGillivray): Well, did the railroad cars extend down beyond where they were emptying salt?

A. Yes.

Q. Do you know exactly how far?

A. No. [237]

(Testimony of Allan Maine.)

Q. And do you know exactly how many cars there were? A. How many cars was——?

Q. Down by the east? A. No, I don't.

Q. Then, Allan, when you and Gerry first came out with that first bucket, was there any way for you to empty that slush north of the tracks except to go through a coupling? A. No, there wasn't.

Q. Well, when you brought that first bucket out and reached the doorway, just what did you do then, you, and what did Gerry do?

A. Well, we had these orders to take it north of the track and the foreman went back up to the dock, or was up on the dock or something, I can't remember just which, but I figured as long as nobody was around might as well just dump it right there, you know, right around by the door there.

Q. Well, not what you figured, Allan, but what did you do and what did Gerry do when you came out with the first bucketful of ice?

A. I mentioned to Gerry, let's dump it right there, and we had these orders and I just did what we were told then, we just carried out the orders.

Q. What did you do in carrying out your orders? [238]

A. We took it hand in hand and went up to the couplers and Gerry went underneath and it was on the rail, we both put it on the one rail, and then I would slide it underneath and push it over and he would grab it on the north side.

Q. Well, now, as I take it, you put the bucket between a coupling, between two cars?

(Testimony of Allan Maine.)

A. Yes.

Q. Now where was that coupling from the door you came out of?

A. West.

Q. Do you know about how far?

A. No. Well, it couldn't have been too far.

Q. It wasn't too far?

A. I can't remember.

Q. Then you and Gerry carried the bucket together up to that coupling to the west of the doorway you came from, is that correct?

A. That is correct.

Q. And then when you got the bucket to the coupling, what did the two of you do with the bucket?

A. Well, we both would—we would put it right on the rail, and then when he went over, well, then I put it down to the middle and pushed it as far over to the north as possible so he could grab it.

Q. You say Gerry went over; you mean over across the track?

A. Yes.

Q. How did he get over there?

A. He had to go underneath.

Q. Under the coupling?

A. Yes.

Q. Then when Gerry got over there, did you push the bucket over to him?

A. Yes.

Q. And he grabbed it from the other side?

A. Yes.

Q. Then where did Gerry empty the bucket, or could you see?

A. No—well, it was right—it would have been right east as you pull it out and just a hair east

(Testimony of Allan Maine.)

of where the coupling was, just as you might——

Q. Then after Gerry had emptied the bucket over north of the line of cars, north of the coupling, what did Gerry then do with the bucket?

A. He would hand it back and I would grab it and take it so it wouldn't be in the way, and then he would come back over.

Q. Now during this operation, Allan, of putting the loaded bucket over to Gerry and then bringing the empty bucket [240] back, were you at any time between the two cars? A. Yes.

Q. Where would you be with reference to the coupling when you would shove it through and then pull it back?

A. Well, I would be just about one foot on one side of the track and the other bending over into the coupling. You would almost be right on top of it.

Q. Do you remember, Allan, how many times you and Gerry had carried a loaded bucket out and dumped it and brought it back before the accident happened? A. No, I don't.

Q. Did Joe Vallarano help empty some of the buckets in that fashion? A. Yes, he did.

Q. Do you know how many?

A. About once or twice.

Q. And did he help Gerry or did he help you, or do you recall? A. Helped me.

Q. Then, Allan, you just tell the jury here in your own words just what happened, where you were and where Gerry was and what you were doing when this accident occurred.

(Testimony of Allan Maine.)

A. Well, we had the orders to empty the slush north of the track, and when we first started we went up there and the bucket was heavy and the foreman wasn't around and [241] I figured, to make it easier, we might as well just dump it there, and he said no, it might mean our job. I don't remember whether he said our job—

The Court: I doubt if the witness understood the question. I think what you want him to answer is what happened at the time the cars moved.

Mr. MacGillivray: Yes.

The Court: Not go back over the whole story again.

Q. (By Mr. MacGillivray): Allan, what I am trying to get at is what were you doing and what was Gerry doing at the time the cars crashed together and the accident happened?

A. He was just handing the bucket back and I reached to grab it.

Q. The empty bucket?

A. The empty bucket.

Q. And what was his position with reference to the rails on the track and the coupling between the two cars?

A. I believe his back was toward the crash, I wouldn't state for certain.

Q. Did he have one foot over the rail or both feet between the rails, or do you remember?

A. I don't remember right.

Q. And what was your position when the crash occurred?

(Testimony of Allan Maine.)

A. I fell backwards and I just reached out like to brace [242] myself and I grabbed a bar and hung on and drug that way.

Q. Where was that bar that you hung on to? Was it on the side of the car or between the cars?

A. It was right the end of a car, there must be a ladder or some bars there. I don't know just which one it is, but I grabbed a bar there. There was some bar there or something to hang on to there and I grabbed that.

Q. Were you struck by the cars?

A. Yes, I was.

Q. Where? A. In the face.

Q. And when you grabbed this bar, then what happened?

A. It started to move the boxcars, they started to move. They didn't move fast, but they were slow. Then they just picked up a little bit and then about, I don't know how far it was, but then I pulled myself up and threw myself out.

Q. Were you dragged—

Mr. Etter: Can't hear. These jurors can't hear and I can't hear.

The Court: It is hard to hear in this room, Allan. You will have to speak up just a little louder.

A. All right.

The Court: Voice doesn't carry very well here.

Q. (By Mr. MacGillivray): Were you dragged down the track for some distance when you were hanging on to this bar? A. Yes.

(Testimony of Allan Maine.)

Q. Where were your feet when you were dragged?

A. One on each side of the track.

Q. You mean one on each side of the track or one on each side of the rail? A. The rail.

Q. Which rail would that be? A. South.

Q. Do you know how far you were dragged down the track? A. No.

Q. How did you finally get out from between the cars?

A. Well, after a bit—well, when they slowed down, I pulled myself up and threw myself out.

Q. What kind of a crash was this, Allan, when the cars came together? A. Very loud.

Q. Then after you threw yourself out, did you throw yourself out on the ground? A. Yes.

Q. Pick yourself up? A. Yes.

Q. Then what happened? What did you do?

A. I run and was yelling to the rest of the crew or who [244] was ever there what happened. I don't remember because I was pretty well—

Q. Did you hear anyone screaming or yelling?

A. Yes, I did.

Q. Tell the jury just what you did and what you heard after you picked yourself up off the ground.

A. Well, it wasn't afterward, it was before while the train was moving. Gerry was yelling real loud, just screaming, going down the track, which you could see part of him but you couldn't see all.

(Testimony of Allan Maine.)

And then there was some yells that come from a salt car.

Q. There was some yells come from the salt car?

A. Yes.

Q. What do you mean from the salt car, inside the salt car? A. Inside.

Q. Inside the car. And then after you picked yourself up, where did you go?

A. I went up on top of the dock.

Q. What did you do up there?

A. Telling them about the accident. I can't remember what I said, pretty nervous.

Q. Did you later go back to where Gerry was?

A. Yes, I did.

Q. How much later? [245]

A. Just as soon as I told them what happened, I run down and followed the train and then I went over the top and saw him laying down there.

Q. And did you get down on the ground over by where he was?

A. About from the distance from where you are.

Q. And what was Gerry doing?

A. He was saying, "Put me out of it, the pain is terrible," and stuff like that. He was conscious.

Q. What did he look like?

A. Well, just chewed off, just ripped, you might say, just yanked something off. It was just blood all over and he was just a mess.

Q. Then how long did you stay around there, Allan? Did you stay there until Gerry was taken away?

(Testimony of Allan Maine.)

A. I didn't stay right there, I left. Too much to look at.

Q. Then when did you go home that night?

A. Right afterwards, just I went up and quit right there, I quit, told them to take the job and I didn't want any more to do with it.

Q. Now, Allan, in your 5 days experience out there, had you ever before the evening of July 17th seen unattended cars float in on either Tracks 12 or 13? A. I have not. [246]

Q. When any of the Addison Miller employees were working on the dock, in, on or around the cars spotted beside the track or dock on either Tracks 12 or 13? A. No.

Q. What was your understanding, Allan, as a member of that Addison Miller crew, as to movement of any cars that were spotted on either Tracks 12 or 13 while you were working on the dock, in, on or around those cars?

Mr. McKevitt: Object to that. That would be calling for a conclusion of the witness.

The Court: Yes, I will sustain an objection to that.

Q. (By Mr. MacGillivray): Well, Allan, when you handed the buckets through to Gerry and then took the empty buckets back from Gerry between the cars and next to the coupling, did you at that time expect that those cars would be moved?

Mr. McKevitt: That is objected to, as to what he expected, your Honor.

(Testimony of Allan Maine.)

The Court: Well, I think so, I will sustain the objection to that.

Q. (By Mr. MacGillivray): Allan, do you recall the white lights on the top of the Addison Miller icing dock? A. Yes.

Q. And are those the lights shown here, overhanging lights [247] on metal poles running down the south side of the dock and also down the north side of the dock? A. Yes.

Mr. McKevitt: What exhibit is that, Mr. MacGillivray, please?

Mr. MacGillivray: Shown on Plaintiff's Exhibit No. 9.

A. Yes.

Q. Do you know how many of those lights there are up and down that dock, those white lights?

A. No.

Mr. MacGillivray: Mr. McKevitt, could we stipulate as to the number of lights without calling a witness? I think you counted them and I think I did, also.

Mr. McKevitt: You mean as of the evening of the accident?

Mr. MacGillivray: Yes.

Mr. Cashatt: I think, Mr. MacGillivray, you need more testimony as to where they are located. Some of them were 300 feet from one end to the other and they aren't all connected together on one switch, a lot of things like that, so I don't think we can stipulate.

Mr. MacGillivray: Well, can we stipulate as to

(Testimony of Allan Maine.)

the number of lights on the top of the Addison Miller dock?

Mr. Cashatt: I don't know myself as to the number. [248]

The Court: Well, you better proceed with the witness, then.

Q. (By Mr. MacGillivray): Well, Allan, at the time Gerry was injured, these two cars crashed together, and at the time you ran immediately up on the top side of the dock, were all of those white lights on top of the dock illuminated?

A. Not unless they had turned some off some place, I don't.

Mr. McKevitt: Can't hear the witness.

A. I would not know.

Mr. McKevitt: You would not know?

A. No.

Mr. McKevitt: All right.

Q. (By Mr. MacGillivray): The question was—I think you misunderstood me—were all those white lights lit?

A. Well, I wouldn't know all the way down, maybe they were and maybe they weren't.

Q. Well, were any of them lit that you are sure of? A. The ones up——

Mr. McKevitt: He is cross-examining the witness, your Honor. He has testified he doesn't know what lights were lighted.

The Court: Unless he knew how many lights there were there, he couldn't possibly know whether

(Testimony of Allan Maine.)

they were all lighted or not. He could say there were some lighted. [249]

Q. (By Mr. MacGillivray): Were any of those white lights lit when you got up on the top side of the dock? A. Yes.

Q. Do you know how many? A. No.

Q. And when your swing shift crew worked at night, either in icing operations or in salting operations, were those white lights on the top of the dock lit at night after dark?

A. I believe they are.

Mr. McKevitt: May I have that last question and answer read?

(The question and answer were read.)

Mr. McKevitt: I wasn't paying close enough attention. I move that the question and answer be stricken unless it is confined to the situation on July 17th of '52.

The Court: That is what you intended, I presume?

Mr. MacGillivray: That's right.

Mr. McKevitt: If he intends that.

The Court: Is that what you intended by your answer, that that is what the situation was on the night of July 17th?

A. That the lights were on?

The Court: Yes?

A. I wouldn't say they were all on, but I know that there [250] was some on.

Q. (By Mr. MacGillivray): Now, Allan, as you and Gerry were taking this last bucket of slush

(Testimony of Allan Maine.)

ice through the coupling and Gerry handed it back to you, did you receive any warning of any nature that cars were drifting down the track in the direction of the cars about which you were working?

A. No.

Q. Did you use to chum around with Gerry much in high school, Allan?

A. Not in my freshman year, no.

Q. Did you know anything about his athletics in high school?

A. I knew he run track.

Q. Know anything about his football?

A. No.

Q. You see Gerry once in awhile now?

A. Now?

Q. Yes. A. Quite often.

Q. You see him more than you did before?

A. Yes.

Q. And did Gerry do the things that the rest of your chums do and try to do now?

A. No. [251]

Q. Where do you see him usually, at home or where? A. Home and at summer school.

Q. Do you go over and visit him at home from time to time? A. Yes.

Mr. MacGillivray: You may examine.

Cross Examination

Q. (By Mr. McKevitt): When you were a freshman at Rogers, Allan, Gerry was a sophomore, is that correct? A. That is correct.

(Testimony of Allan Maine.)

Q. And you met him prior to the time that you started at Rogers or after?

A. After I started to Rogers.

Q. Well, you are a senior now? A. Yes.

Q. And he graduated when, just a year ahead of you? A. '55.

Q. Pardon me?

A. I graduate in '55, 1955.

Q. And Gerry graduated when?

A. He will graduate from summer school.

Q. I see. Well, between the beginning of your sophomore year and during his senior year, you became very friendly, did you not? [252]

A. Yes.

Q. He visited at your home? A. Yes.

Q. Did you visit at his home? A. Yes.

Q. And that is true of Idaho Davis, also, you were all three very chummy, isn't that correct?

A. Yes.

Q. And still are? A. Yes.

Q. Now you went to work for the Addison Miller Company on July 17, 1952, correct?

A. Did I go to work?

Q. That is the day you went to work for them, July—or 5 days prior to that? This injury occurred July 17, '52? A. Yes.

Q. And that was the fifth day that you had worked for Addison Miller?

A. I believe so, yes.

Q. Well, you said you had worked for them 5 days before the accident happened, didn't you?

(Testimony of Allan Maine.)

A. Yes.

Q. So what would that be? There is 17, 16, 15, 14—you went to work, then, on the 13th of July for the first [253] time for Addison Miller?

A. Well—yes, it might be, I don't remember when it was I went to work. I had a day off or two days, I don't even remember, because I was too young, whether it was one day or two days off, so I really couldn't say when I went to work.

Q. Well, did you work for Addison Miller in 1951? A. No.

Q. The first employment that you had with Addison Miller began in July of 1952?

A. Yes.

Q. And it covered a 5-day period?

A. Yes.

Q. Whether you worked every day or not?

A. Yes.

Q. Were there some days in that 5 days that you didn't work? A. No.

Q. Where did you make application for your employment with Addison Miller?

A. At their office down at—I don't remember which street it was. It is underneath one of these bridges up there.

Q. You didn't go to any Northern Pacific office to get work at the Addison Miller plant? [254]

A. No.

Q. You knew that was a separate organization from the Northern Pacific, didn't you?

A. No, I never. I had a friend that worked

(Testimony of Allan Maine.)

there and that is where he got his so I went to the same place.

Q. You had a friend that worked for Addison Miller? A. Yes.

Q. On the icing dock? A. Yes.

Q. What was his name? A. Bob Mildis.

Q. Who? A. Bob Mildis.

Q. Was he working there at the time that Gerald got hurt?

A. No, he wasn't, he was on another shift.

Q. Did you and Gerald go down together to get employment at Addison Miller? A. No.

Q. Was he working before you started to work in July or after you started to work?

A. I think the same day, I wouldn't be sure.

Q. You think you both started on the same day?

A. Yes.

Q. In 1952? A. Yes. [255]

Q. Well, did you go out together?

A. No.

Q. You just went out there and found out that Gerald was working there? A. Yes.

Q. And when you were sent out from the Addison Miller from the downtown office, who did they tell you to report to? Was it Mr. Fincher?

A. I don't remember.

Q. Well, how did you get out to the yards from downtown? A. Hitchhiked.

Q. Walked out by yourself? A. Yes.

Q. And inquired where the Addison Miller yards were? A. At the office.

(Testimony of Allan Maine.)

Q. Yes. Out at Parkwater? A. Yes.

Q. And who did you first talk to when you went out there?

A. I don't remember who it was.

Q. Well, was it Mr. Fincher?

A. Well, there was a bunch of men waiting to be employed. I imagine they all got employed the same day and—

Q. Well, you know now who Mr. Fincher is, don't you? A. Yes.

Q. And you know that he is the foreman that you say gave [256] you these instructions about cleaning out that ice pit? A. Yes.

Q. Well, now, is he the man that put you to work when you went out there the first day?

A. Well, I don't remember. They had more than one foreman out there.

Q. There was a foreman over Fincher, isn't that true?

A. I don't know if he is over him or is the same.

Q. Well, you were instructed by someone what duties you were to perform, were you not?

A. Yes.

Q. The first day you went out. You don't recall who that was? A. No.

Q. Well, do you recall whether it was Fincher or someone over Fincher?

A. I don't recall, it may have been Fincher and it may not have been Fincher.

Q. What work did they put you doing the first day you started to work?

(Testimony of Allan Maine.)

A. I don't know.

Q. Well, was it up on top of the icing dock icing cars?

A. It may have been, I don't remember.

Q. Well, you had never carried slush ice across those tracks under cars before the 17th of July, as I [257] understand it? That is the first time, isn't it?

A. Yes.

Q. Well, now, apart from that work, in the 5 days, what did you do there? You only did that once. Did you ice cars up on top of the dock?

A. Yes.

Q. And did you put salt in cars up on top of the dock after the ice was put in?

A. Yes, I did.

Q. And then did you unload salt from boxcars into the salt house?

A. Yes.

Q. That was your principal work, was it not, those three jobs?

A. Well, that is what I did at the time.

Q. Yes. You were just there 5 days?

A. Yes.

Q. And when you reported for work out there on your swing shift which began at 3 o'clock, you always entered the main ice plant first, didn't you?

A. Yes.

Q. Did you carry your lunch with you?

A. Sometimes, yes.

Q. We speak of lunch, it would be what you boys would eat around the evening meal time, wouldn't it? [258]

(Testimony of Allan Maine.)

A. Yes, I imagine it would.

Q. You went to work at 3 o'clock, naturally you have something to eat before you went to work, wouldn't you?

A. Yes.

Q. Well, that would be your evening meal after you went on shift, would it not?

A. We ate before we went to work and then we had lunch.

Q. Well, what you call lunch, we might call the evening meal, dinner or supper, isn't that correct?

A. Yes, yes, that's right.

Q. And that you state on this particular evening you went to what you call lunch, what we might call dinner or supper, and you went to the Dairy Queen?

A. Yes.

Q. And you procured a hamburger and a milk shake there, is that correct?

A. That is usually what we got, yes.

Q. Was that your recollection what you got there that night?

A. I wouldn't know if that is what I got or not, but that is what we usually get. I mean, I don't remember, it could have been some french fries, too, it could have been almost anything we go over there and get.

Q. And then you came back from the Dairy Queen, you went into the ice plant, is that correct?

A. No, I have never been in the ice plant.

Q. Well, on this particular evening, July 17th, you went over to the Dairy Queen and got something to eat, didn't you?

A. Yes.

(Testimony of Allan Maine.)

Q. Did you eat it at the Dairy Queen?

A. No.

Q. You brought it back to the Addison Miller plant, didn't you? A. Yes.

Q. Where did you eat? Did you go through the tunnel on to the dock and eat on top of the ice dock?

A. No, we ate over there where there was room to park around the company, around the plant there.

Q. Well, now, in going to the ice plant proper, in going through that tunnel, you never had to cross a single track of the Northern Pacific, did you?

A. No.

Q. In going to the ice house and going through the tunnel, you never had to cross a single track of the Northern Pacific, did you? A. No.

Q. In going up on top of the ice dock, you never had to cross a single track of the Northern Pacific, did you? A. No. [260]

Q. In going out to unload salt from the salt car into the salt house, you didn't have to cross a single track of the Northern Pacific, did you?

A. To go to the salt car?

Q. You went into a boxcar to unload salt into the salt house; you didn't have to cross or get on the rails of a single Northern Pacific track, did you?

A. Well, the boxcar was on the track.

Q. Yes, so you didn't have to get on or across the rails of any track, did you? A. No.

(Testimony of Allan Maine.)

Q. No, and the only time that you were required to cross a track of the Northern Pacific, one rail or another or to get between them, in the 5 days you were out there was this one occasion when you say Mr. Fincher instructed you to dump ice north of Track 13; that is true, isn't it?

A. That is correct.

Q. And that is true of Gerald, also, to your knowledge, isn't it?

A. Yes.

Q. And that was the only occasion that Mr. Fincher had instructed you to dump slush ice, isn't it, was on the 17th?

A. Yes. [261]

Q. Now do you recall that when you went to work at 3 o'clock in the afternoon of July 17th on this swing shift, which went on to 11 o'clock, you had an 8-hour shift, do you recall you did do some icing operations after 3 and before you went to the Dairy Queen, you did some icing work on refrigerator cars, didn't you?

A. May have, I don't remember if we did or not.

Q. Well, you weren't idle for that whole time you were out there?

A. No, I wasn't idle, but may have been doing something, I don't remember what it was.

Q. Well, you would either be icing cars or unloading salt or salting the cars up above, isn't that correct?

A. Or else putting salt on the dock.

Q. On putting salt on the dock, all right.

A. I don't remember.

(Testimony of Allan Maine.)

Q. Do you recall that afternoon that there was a long fruit train that came in there to be iced?

A. No.

Q. You don't recall working on that train?

A. May have, I don't remember.

Q. You don't recall? A. That's right.

Q. Well, do you recall at the time you went to lunch, what time that was? Was it 6 o'clock or 7, or what time it [262] was?

A. It was about that time, 6 or 7.

Q. Yes. Well, now, as a matter of fact, at the time that Gerald got hurt and you boys started to clean out this slush pit, that was around 8:30, between 8:15 and 8:30 in the evening, wasn't it?

A. I don't know. It could have been later, it could have been earlier.

Q. Well, you used a time here around 7 o'clock, 7 or 7:30; I am wondering if you meant by that, that that is the time you started to carrying this ice out of that slush pit; that isn't true, is it?

A. I don't know. What was the question again?

Q. What I am trying to get at, Allan, I know this is two years ago, your best recollection of what time of the evening was it when you and Gerald started carrying ice out of that slush pit?

A. It was just getting dusk, I imagine, or it was dusk.

Mr. Etter: Can't hear you, Allan.

A. It was about dusk.

Q. (By Mr. McKevitt): Well, whether it was 7, 7:30, 8, or 8:30, you don't know?

(Testimony of Allan Maine.)

A. That's right.

Q. These instructions that were given to you by Mr. Fincher, who did he give them to? Did he call you [263] several boys together and say, "I want you fellows," naming you, "to go down and clean out the ice pit," or how did he designate that particular crew?

A. Gerry had the crew, he picked the crew.

Q. Pardon me?

A. Gerry picked the crew.

Q. Oh, Mr. Fincher, then, told Gerry to pick a crew and go down and clean out the ice pit?

A. Yes.

Q. And then Gerry came back and selected you and Gerald and Idaho Davis, is that correct?

A. We were all together when he told him, the whole crew, or most of them. I don't know if it was the whole crew or not, but we were up on top of the dock when he gave the order.

Q. Well, how many Addison Miller employees were on top of the dock when you got these instructions that somebody got?

A. Quite a few, I imagine. I wouldn't know for sure how many there was.

Q. Well, Gerald has used a figure of 20 or 25 employees of the Addison Miller, he thought, that was his best guess. Were there that many on top of the dock at the time that Fincher gave these instructions?

A. Could have been, I wouldn't know. [264]

Q. Fincher didn't say to you, "Allan, Mr.

(Testimony of Allan Maine.)

Maine," or "Maine, go down and clean out the ice pit," he never said that to you, did he?

A. No, he never.

Q. And he didn't say to Gerald, "Gerald Stintzi, you go down and clean out that ice pit," he didn't say that to him, did he?

A. I don't know, I don't think so, I don't know. I couldn't say, that was two years ago, that is a long time. I don't remember what he said.

Q. Well, did you hear him talking to Vallarano personally?

A. No. I don't know, I don't know what happened after that.

Q. Well, you said that you were instructed, as I understood you to say, "We were instructed to go down and clean out the pit and dump this ice north of the track?"

A. That is correct.

Q. What I am getting at is, Mr. Fincher, the Addison Miller foreman, didn't tell you to do that, did he?

A. There was a crew that was told to do that.

Q. Well, who picked this crew?

A. Gerry.

Q. Huh? A. Gerry.

Q. Gerald Stintzi? [265] A. Yes.

Q. He selected you, did he? A. Yes.

Q. And he selected Vallarano? A. Yes.

Q. And Idaho Davis? A. No, not Idaho.

Q. Well, some Canadian boy or chap?

A. Yes.

Q. So then Gerald said to you fellows, "Come

(Testimony of Allan Maine.)

on, we're going down and clean out that ice pit?"

A. Yes.

Q. Did you personally hear Mr. Fincher tell anybody to dump that ice north of that track?

A. No—yes, I did.

Q. You said what?

A. Yes. I was with him when he was there to give the orders.

Q. I see. So then you went down into the ice pit, these four or five of you, and somebody is down in the slush pit, as it is called, the ice pit, and he fills the bucket, shovels into a bucket, is that right?

A. Yes.

Q. And it is ice that has been all broken up as it goes through that conveyor, is that correct? [266]

A. Yes.

Q. Ice that would melt very quickly in warm weather if dumped on the ground? A. Yes.

Q. Isn't that right? A. That is correct.

Q. Yes. And the first operation of carrying it from one side of Track 13 to the other was by you and Gerald, is that true?

A. Yes, that is correct.

Q. And then after so many buckets had been handled by you two, then Vallarano changed off with somebody? A. Correct.

Q. And whose place did he take, yours or Gerald's? A. Gerry's.

Q. So then you and Vallarano carried a certain number of buckets from one side of Track 13 to the other, is that correct? A. Yes.

(Testimony of Allan Maine.)

Q. How many buckets?

A. Oh, two—I don't remember how many it was.

Q. And then there was a switch back then from Vallarano to Gerry, is that true? A. Yes.

Q. What happened, did Vallarano get tired or something? [267]

A. Yes. I don't know if he got tired or not, but that is just the way it happened.

Q. How old a man was Vallarano?

A. I don't know.

Q. Was he older than you and Gerald? A. Yes.

Q. Was he over 20? A. Yes, I imagine.

Q. Well, about how old was he at that time?

Mr. Etter: He already said he didn't know. Going to guess his age, count rings around them or

Mr. McKevitt: Well, I can ask him approximately.

Q. He was over 20, was he, you say? A. Yes.

Q. And you don't know how much over 20?

A. No.

Q. But, anyway, it is a fact he says, "Well, this is a little too heavy for me, you fellows take over;" that is about what he said, wasn't it, carrying the ice in that manner under those couplers; isn't that true?

A. I don't know if he said—what he said. I know after I come back, Gerry and I started over again.

Q. Now when you came up with this first bucket of ice out through that door on the north side of

(Testimony of Allan Maine.)

the ice dock, [268] you would be facing that direction, there are some cars on that Track 13, isn't that correct? Isn't that right?

A. I don't know the track numbers.

Q. Well, the way we orient, this is east and this is west (indicating). A. Yes.

Q. Let's assume this is the Addison Miller dock, you come out the door there and you walked and here is Track 13, isn't that true? You are looking north now, then you made a left-hand turn and you walked to the west, didn't you?

A. We come out of the door and we went on the west, yes.

Q. Made a left-hand turn? A. Yes.

Q. Now when you did that, why did you turn to the west instead of the east?

A. That way would be away from the dock.

Q. You are speaking about the salt dock now?

A. I am speaking of the what?

Q. You say you wanted to get away from the dock? A. We are carrying the ice.

Q. Oh, you mean the ice dock itself?

A. We are carrying the ice bucket to the west.

Q. Why didn't you go to the east with it? [269]

A. There was men working there.

Q. Pardon?

A. There was men working toward the east in the salt car.

Q. How far were they from you?

A. I don't know.

(Testimony of Allan Maine.)

Q. Well, were they one boxcar length or two boxcar lengths? A. I wouldn't know.

Q. You haven't any idea? A. No.

Q. So what you did, you came out and you saw these men up there to the east of you and this platform, isn't that true? A. That is correct.

Q. And you decided instead of crawling under this platform with a bucket of the ice, you would pass it under the coupler, it would be quicker to do it and you wouldn't have to walk so far; that is true, isn't it?

A. Well, we had no—we never had to take it down that way, anyway. There was no reason why we should take it down that way.

Q. But before you crossed that track at all and while you were between Track 13 and the dock, you suggested to Gerald, didn't you, that you dump that ice between Track 13 and the icing dock; you did that, didn't you? [270]

A. Yes—it was to dump—we didn't have to go across because that would just mean we would have to mess around with the bucket more, so. I just suggested that we dump it there, but that would have been right underneath the dock and there was nothing supposed to be dumped underneath the dock.

Q. That is a big wide bare space of ground under that ice dock, isn't it? A. Yes.

Q. Ordinary dirt, isn't that true?

A. Yes.

Q. You dumped that ice on there and it would

(Testimony of Allan Maine.)

probably melt within 15 minutes, 20 minutes, or half an hour, depending on the weather, and that was July, isn't that correct?

A. Could have, maybe.

Q. Yes. So when you walked this 10 feet to the east, you were just going to the first opening between the two cars; that is what you were picking out, wasn't it? A. Yes.

Q. And you knew those two cars were coupled together? A. Yes.

Q. And you knew there was an air hose likewise in there in addition to these iron couplers, didn't you?

A. I don't remember if there was or not. [271]

Q. And this big ice bucket you had would carry about how many pounds or gallons of ice?

A. Oh, I wouldn't know.

Q. Twice as big as this waste basket?

A. I don't know, it could have been bigger around than that.

Q. About the same height?

A. I don't know. If I saw the bucket, I might be able to tell you, I don't remember what size it was. It was a fairly large bucket, that's all I remember.

Q. Had a handle on the top? A. Yes.

Q. So each one of you could get hold of a side and you could walk with the bucket with one carrying it, isn't that correct?

A. That is correct.

Q. When you got down to these two cars that

(Testimony of Allan Maine.)

were coupled and Gerald then first crawled under the couplers, did he not? A. Yes.

Q. To get to the other side of the track?

A. Yes.

Q. And then you in some manner took this ice bucket and what did you do? Assuming this is the coupler, did you raise it over the coupler and hand it to him? [272] A. No, I never.

Q. No, you slid it underneath? A. Yes.

Q. Is that correct. And then he would reach from the other side and pick it up and go over and empty it in this space? A. That is correct.

Q. Isn't that true, and then he would come back and he would get down on his knees, I assume, wouldn't he, to pass this under the couplers?

A. I don't know if he had to get down on his knees or not, but he passed it back.

Q. Well, a portion of his body had to get in between the rails to hand it to you, isn't that true?

A. Yes.

Q. From the other side, you would reach and pull it out? A. Yes.

Q. Is that correct. And then after that was done, why Gerald would either crawl over the couplers or crawl under them to go back to the ice dock with you, wouldn't he? A. Yes.

Q. And how many times did he do that before Gerald was hurt?

A. I don't know, I couldn't say. [273]

Q. Well, was it more than five?

(Testimony of Allan Maine.)

A. It may have, I don't remember how many times it was.

Q. Haven't you any idea at all how many buckets of ice you carried, you and Gerald, before he got these terrible injuries he got?

A. That was two years ago, as I said, when I was 16 years of age. I don't really remember how many loads it was.

Q. The real reason that you suggested to Gerald to dump that ice between the dock and Track 13 was that you felt it was dangerous to be crawling under those cars, didn't you? Now that is true, isn't it?

A. Dangerous? Well, you look—it is, no, not dangerous; you expect safety when you work in a place like that. I mean, you automatically think that they should have some precautions for safety.

Q. You mean Addison Miller?

A. I mean whoever runs the railroad there, that part.

Q. You weren't working for the railroad, were you?

A. I was working for Addison Miller, but that is just what—I mean, the whole thing was supposed to be safety. I mean, if I had knew it was dangerous to work there, I wouldn't have ever went to work there.

Q. In other words, you thought that every time you worked at Addison Miller, whether you were carrying ice between cars or under couplers or

(Testimony of Allan Maine.)

wanted to cross over [274] for any reason, that you felt it was safe to do that? A. Yes.

Q. No matter what kind of work you were doing? A. No matter what kind.

Q. Even if you were going to go to lunch, instead of walking around the cars, you felt it was safe to go through them, is that right?

A. We didn't have to crawl through cars to go to lunch.

Q. Now you had learned, had you not, in the 5-day period that you worked there and before Gerald received these bad injuries, that when any cars were being iced, you knew that the Addison Miller man would put a blue lantern up on the top of this ice dock that could be seen by railroad men; you knew that, didn't you? A. Did not.

Q. You didn't know anything about that?

A. No.

Q. Well, you have learned since that that was the fact? A. I have since the accident.

Q. How long after the accident was it that you learned that the way the Addison Miller men would warn Northern Pacific switch crews that there were men working in or near cars was by putting this blue lantern up on top of the ice dock? How long after Gerald was hurt did you learn that was the practice on the part of Addison [275] Miller?

A. After the accident.

Q. Right after the accident, wasn't it?

A. Yes.

Q. Within a day? A. I don't remember.

(Testimony of Allan Maine.)

Q. Is that true?

A. I don't remember if it was within a day or what it was. It could have been.

Q. Didn't you express the opinion that if the Addison Miller man, Fincher, had had this blue light up on the platform and put it there like he was supposed to do, that Gerald wouldn't have gotten hurt?

Mr. MacGillivray: Just a minute. I object to that, your Honor, as calling for an opinion.

The Court: I think if you are going to lay the foundation for impeachment, you should show when and where and in whose presence you claim he made the remark.

Q. (By Mr. McKevitt): Do you recall meeting Mr.—stand up—see that gentleman there?

A. Yes.

Q. Do you recognize him?

Mr. Etter: Speak up, please, Allan.

A. No.

The Court: He said to speak up. [276]

The Witness: Oh.

Mr. Etter: Speak up, we can't hear half of your answers.

Q. (By Mr. McKevitt): Do you see this gentleman here (indicating)?

A. No.

Q. Did you ever give any statement to any representative of the Claim Department of the Northern Pacific shortly after this accident?

A. I may have, I don't remember.

Q. A signed statement?

(Testimony of Allan Maine.)

A. I don't know, I may have.

The Clerk: I have marked Defendant's Exhibit 17 for identification.

Mr. McKevitt: May I approach and hand this to the witness, your Honor?

The Court: Yes, all right.

Q. (By Mr. McKevitt): I show you Defendant's Exhibit No. 17 for identification, and calling your attention to a signature at the bottom and some writing there in pen and ink, will you examine it, please? A. What is that?

Q. Well, I will ask you, is this your signature, Allan A. Maine? A. Yes. [277]

Q. Do you see the date July 18, '52?

A. Yes.

Q. That was the day after the accident, wasn't it? A. Yes.

Q. This A. C. Thomsen, that is the man who took your statement, isn't it, of the railroad?

A. It must be him.

Q. Did you give that statement to him voluntarily of your own free will? A. Yes, I did.

Q. Did you read it before you signed it?

A. Yes, I did.

Q. Did you understand its contents thoroughly before you signed it? A. I believe so.

Q. Mr. Thomsen didn't suggest to you that you say anything, did he, except to tell him what you knew about this accident, isn't that correct?

A. That is correct.

(Testimony of Allan Maine.)

Q. I will ask you in that statement if you didn't state to Mr. Thomsen as follows—

Mr. McKevitt: I might say to your Honor, that counsel for the plaintiff have copies of this statement in their possession and have had for some time.

Mr. MacGillivray: Mr. McKevitt, aren't there two [278] statements from this witness?

Mr. McKevitt: Well, yes, you have got copies of both of them.

Mr. MacGillivray: Let's have both of them.

Mr. Etter: Let's have both together.

Mr. McKevitt: Can't put them both in at one time.

The Court: All right, go ahead.

Mr. MacGillivray: Wait for the second one, then.

Mr. McKevitt: All right, we will just wait.

Q. I will ask you if in this statement, Exhibit 17, of July 18, 1952 at Spokane, Washington, you did not state to Mr. Thomsen as follows:

“I know there are blue lights overhead on the dock, electric lights, and I understand that switchmen are not to move the cars we are working on until it is clear. Account I can't see the blue lights from where we were working, I don't know if they were burning or not. I think our foreman at the ice dock was supposed to turn on those lights when we are working on the cars there. I believe the cause of the accident was carelessness in not having the lights turned on when we worked there.”

(Testimony of Allan Maine.)

You made that statement, didn't you, to Mr. Thomsen? [279]

A. Lights that I mentioned there are the lights at the east end of the dock which I was talking about, if that is the lights.

Q. Well, you were referring to carelessness in not having the lights on; you are referring to the carelessness of Mr. Fincher, the foreman for Addison Miller, aren't you?

A. I don't know who I am referring to.

Q. I see. Now apart from these instructions that you state you heard Mr. Fincher give to dump this ice north of Track 13 and between 13 and 14, you don't know of any reason at all, do you, why the ice had to be dumped there instead of under the dock or between 13 and the dock, no reason for it, was there, except that he told you to do it, as you have testified?

A. There was—we were following out orders.

Q. Yes. But there was no reason that you know of, apart from these orders, why that ice couldn't have been dumped between the dock and Track 13 or under the dock, except for the orders?

A. I believe you are not supposed to be underneath the dock.

Q. Pardon me?

A. I believe you are not supposed to be underneath the dock. [280]

Q. You believe what is not supposed to be under the dock?

A. A person is not supposed to be underneath

(Testimony of Allan Maine.)

the dock when there is a train or anything like that at all.

Q. You mean underneath the ice dock?

A. That's right.

Q. Well, if you are underneath the dock, no train can injure you, isn't that true?

A. That is correct, but falling ice can.

Q. Pardon me? A. Falling ice can.

Q. Where would the ice come from that would be falling if you were underneath the dock?

A. On top of the dock.

Q. If they are icing cars? A. Yes.

Q. I see. But at the time that you and Gerald went down there to carry out this slush ice, there was no icing of cars going on; you know that, don't you?

A. I believe so. I don't know, I really couldn't say, I don't think they were.

Q. You know there was no icing of cars going on; you know that, don't you?

A. There may have been, I don't think there was, though. I wouldn't say for sure.

Q. You state that you recall there was a salt car there [281] that evening just prior to the time Gerald was injured?

A. Before, before the accident.

Q. Yes. Are you positive of that?

A. That the car was there before we went to lunch or afterwards?

Q. Was the salt car there before you went to lunch; isn't that correct?

(Testimony of Allan Maine.)

A. I wouldn't know.

Q. You don't know? A. No.

Q. Well, was there a salt car after you came back from lunch? A. Yes, there was.

Q. Right opposite the salt dock?

A. Right opposite the salt house there.

Q. Yes. So, then, that car must have come in there after you went to lunch, is that true?

A. Yes.

Q. And how many cars were there between that salt car and this door out of which you and Gerald came with this bucket of ice?

A. I don't know.

Q. There weren't more than two cars, if there were that many, east of that door, were there?

A. I don't know how many cars there is, I don't know the [282] distance.

Q. You don't know—

Mr. MacGillivray: Allan, try your best to speak up. I know I am having a little trouble and the jurors are having a little trouble hearing you.

The Witness: Yes.

Mr. MacGillivray: What, are you a little scared up there?

The Witness: Yes.

Mr. McKevitt: Well, not with me, are you?

Mr. MacGillivray: Well, it might be me. I think probably it is me.

The Court: Older people get nervous, too, even I get nervous, too, so don't let it bother you too much.

(Testimony of Allan Maine.)

All right, go ahead.

Q. (By Mr. McKevitt): Well, now, you have described the salt car as being opposite the door of the salt house. What kind of cars were these between which you were passing this ice? Were these boxcars, cattle cars, what were they?

A. I don't remember what they are.

Q. You don't remember? A. No.

Q. And you don't remember what kind of a car was east of the salt car? [283] A. No.

Q. Or west of the salt car? A. No.

Q. What kind of a car was the salt car?

A. Freight car, I guess. I wouldn't know because I don't even know what they call cars.

Q. Would it be safe in saying that most of the work that you did in that five days there, Allan, was up on top of the dock icing cars? Would that be where you worked most of the time?

A. Yes.

Q. And, of course, the top of the dock is above the tops of these refrigerators which are to be iced, aren't they? A. Yes.

Q. Probably two or three feet. You know what they call them, call them "reefers," don't they, "reefers," short for refrigerators?

A. Ice cars, I guess that is it.

Q. Reefers, and all cars are iced from the top of the cars, aren't they? A. Yes.

Q. There is an opening on the end of each refrigerator car probably three or four feet in length, is that right, something like that? [284]

(Testimony of Allan Maine.)

A. At the top of the car?

Q. Yes, where you put that big chunk of ice?

A. I don't know, could have been. It wasn't quite that big, I don't imagine.

Q. Say this is the dock here, the icing dock, (indicating) the ice comes along on this chain, a conveyor, doesn't it? A. Yes.

Q. And it can be picked off then from along there, depending on where the refrigerator car is, isn't that right? A. Yes.

Q. And then it is slipped over and down here a foot or two below the icing dock is the top of the car to be iced, isn't that true?

A. Yes, that is correct.

Q. And you shove it right over into that opening, isn't that right? A. Yes.

Q. And then some of you either have these pick axes or something you chop this ice up very fine, isn't that true? A. That is correct.

Q. And then before the door is closed, there is so much salt sprinkled on top of the ice, isn't that correct? A. Yes. [285]

Q. And all the time that those cars were being iced, you have observed, have you not, when you worked there, the Northern Pacific man who was keeping track of the amount of ice that would go into each refrigerator car; you have observed that man there, haven't you?

A. I know there is a man that does that.

Q. Yes, a Northern Pacific man?

A. Well, I don't know if he is Northern Pacific

(Testimony of Allan Maine.)

or who he was, I know there was a man that did it.

Q. That was checking the number of cakes of ice that went into each car, isn't that right?

A. Yes.

Mr. McKevitt: That is all.

The Court: We will take a 10 minute recess.

(Whereupon, a short recess was taken.)

Mr. McKevitt: May I ask one additional question, your Honor?

The Court: Yes, all right.

Q. (By Mr. McKevitt): Allan, I would like to show you Plaintiff's Exhibit No. 16, a photograph. Have you seen that photograph before during the course of the trial? A. Yes.

Q. You have discussed it with Gerald's counsel, is that [286] right? A. Yes.

Q. And you recognize—

Mr. MacGillivray: Mr. McKevitt, he won't speak up while you are right there.

Mr. McKevitt: All right.

Q. You have discussed this photograph and its various aspects with the attorneys for Mr. Stintzi, haven't you? A. Yes.

Q. Now we have agreed that this portion of the picture, which is the left side of the picture, represents one portion of the building; you understand that? A. Yes.

Q. Now referring to that and showing you this opening here where I am pointing, are those white sacks of salt there, would you say?

A. Yes, that is salt.

(Testimony of Allan Maine.)

Q. That is the salt storage house, isn't it? Isn't that true? A. Yes.

Q. And on the right-hand side of the picture there are two doors, are there not? I am pointing to them. A. Yes.

Q. And that is for the storage of salt, also, is it not? A. It is. [287]

Q. Now when you came out of this door, and Gerald designated that as being at this point "X", the right-hand side of the picture, where were these men, at what door were they loading salt from this car that you have talked about, this one where the white sacks are or one of these doors on the right-hand side of the picture?

A. One of these two, I'm pretty sure.

Q. On the right-hand side of the picture?

A. Yes.

Q. Now you came out of this door, you see the door there, you recognize this as the track, isn't that right? A. Yes.

Q. You made this left-hand turn?

A. Yes.

Q. And you are just a short distance from the end of the building, are you not? See the end of the building there (indicating)?

A. I don't know, there is nothing there, no picture of it.

Q. Well, taking a look at the whole structure that is shown in this picture, is there more of the building in this direction than is shown on the picture?

(Testimony of Allan Maine.)

A. There may be, I can't remember.

Q. Well, when you came out of the building at this point marked "X", you suggested you dump between the building and the south rail of Track 13, didn't you? You [288] thought it would be all right to dump there?

A. Well, no one there, so I figured we could, but under orders we weren't supposed to.

Q. Yes, it was your suggestion, and then it was Gerald's statement, "Well, we got orders to go to the other side of the track?"

A. Yes.

Mr. McKeivitt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Allan, when you suggested to Gerry that you dump the ice south of the track, did you at the same time say anything about Mr. Fincher, about where he was?

A. No.

Q. Well, when you discussed that you dump south of the track, what did Gerry say?

A. He says, "We better not."

Q. Did he say why not?

A. Well, underneath there you are not supposed to be there when the trains are there on account of there is ice on top of the dock and falling ice could fall down on a person.

Q. Handing you, Allan, what is marked as Plaintiff's Exhibit 9, do you see any loose large chunks of ice on [289] the edge of that icing dock?

A. Yes.

(Testimony of Allan Maine.)

Q. In how many places down that dock?

A. Almost all the way.

Q. And was that the condition that was prevalent out there on that dock at all times, whether they were actually icing cars or not, that you had loose pieces of ice on the edge of that dock?

Mr. McKevitt: I object to the form of the question, your Honor. I think he is confined to what the condition on the top of the dock was on that date.

Mr. Etter: That is what he asked him.

Mr. McKevitt: No——

The Court: Overrule the objection, he may answer.

Mr. MacGillivray: Read back the question, please.

(The question was read.)

A. Most of the time, yes.

Q. And during your five days there, did you ever see large pieces of ice fall off the edges of that dock? A. Quite often, yes.

Q. And were you given instructions about walking underneath that dock on either the north side or the south side? A. Yes, we were.

Q. What were your instructions? [290]

A. That we weren't supposed to walk underneath or by this dock on account of this ice. There may be someone up there just walking along, they could push it off. I mean, not to have it on the dock, anyone walking along the side, it would fall down.

Q. Was that the reason given to you why you

(Testimony of Allan Maine.)

shouldn't walk along either side of that dock, that ice might fall on your head? A. Yes.

Mr. MacGillivray: Now, Mr. McKevitt, do you have that statement you had marked as an exhibit?

Mr. McKevitt: Yes.

Mr. MacGillivray: The original?

Mr. McKevitt: Yes.

Mr. MacGillivray: And do you have the second statement, the original of it?

Mr. McKevitt: Yes.

Q. (By Mr. MacGillivray): Mr. McKevitt asked you if some railroad claim agent was not out to see you on July 18, 1952 and you stated there was and you signed a statement marked as Defendant's Exhibit 17, is that correct? A. Yes.

Q. And then do you recall, Allan, that on August 7th about, oh, say two and a half to three weeks later, that that same gentleman was out and had you sign another [291] statement?

A. I don't recall him coming out at all.

The Clerk: Marked as Plaintiff's 18 for identification.

Q. (By Mr. MacGillivray): When this happened and when the gentleman came out on the 18th of July, that was the day after Gerry had had this accident and you had seen what had happened to him? A. Yes.

Q. And you were 16 years of age at that time?

A. Yes.

Q. Were you still kind of scared at that time from what you had seen the night before?

(Testimony of Allan Maine.)

A. I was scared a long time afterwards.

Q. Well, handing you what is marked as Plaintiff's Exhibit 18, is that your signature, Allan?

A. Yes.

Q. And do you now recall a railroad man being out and taking a statement and probably later coming out and having you sign it and you did sign it?

A. If I signed it, that is it, then.

Q. And you think you probably read it before you signed it? A. I believe so.

Mr. MacGillivray: I ask the admission, your Honor, [292] of Defendant's Exhibit 17 and Plaintiff's Exhibit 18.

Mr. McKevitt: If your Honor pleases, my interrogation of Mr. Maine with reference to the first statement had to do only with his testimony with reference to lights. That's all I asked him about.

Now if there is anything in the subsequent statement, the one in August, about lights, I will have no objection. Is there, Mr. MacGillivray?

Mr. MacGillivray: Your Honor, I submit that when Mr. McKevitt goes into a part of a conversation had with a railroad claim agent and a part of a statement made to a railroad claim agent, that we are entitled to have the full statement in.

The Court: Well, I think they should be admitted, both of them.

Mr. McKevitt: Very well.

(Testimony of Allan Maine.)

(Whereupon, the said statements were admitted in evidence as Defendant's Exhibit No. 17 and Plaintiff's Exhibit No. 18.)

Q. (By Mr. MacGillivray): All right, Allan, do you remember on July 18, 1952, when this railroad man came [293] out, did you not tell him this and sign a statement to this effect:

"Statement of Allan Maine, Age 16, single——"

Mr. McKevitt: I desire the record to show it is not proper redirect examination. I didn't go into this statement of August 18th with him at all or anything in it.

Mr. MacGillivray: I am talking about the statement of July 18th.

The Court: Well, I think that is probably proper use of the exhibit. You can read it to the jury if you wish to, read all of it, or any part of both exhibits, now that they have been admitted. If you omit any part, then Mr. McKevitt may read the rest of it.

Mr. MacGillivray: Well, then, may I read the whole statement, your Honor?

The Court: Yes.

Mr. MacGillivray: (Reading)

"July 18, 1952.

Statement of Allan Maine, age 16, single, car icer, Addison-Miller Co., there several days only, address E3634 Queen, phone GL-8766, made in connection with personal injuries of Jerry Stintzi, icer, at Yardley, Wash., July 17th, 1952, at about 9:00 p.m., dark, clear and fair weather. [294] Stintzi and I

(Testimony of Allan Maine.)

had been instructed by Foreman Fincher to carry out slush ice from the pit inside the building and throw it on the ground north of the track next north of the ice dock. We had carried out about fifteen or more loads of slush. We used a large metal bucket, or pail, with a handle on it, like a coal bucket. The bucket was suitable for the work we were doing with it. Just us two on that slush-carrying job there. There were ice cars standing on that dock track. There were cars on the track west of the door we worked out of, and I could not see the west end of that string. We carried the bucket by the handle, between us. When the accident happened, Stintzi had crawled under the couplers between two freight cars, and I had passed the loaded slush bucket over to him, and he had dumped it out on the ground, and was passing the empty bucket back to me, passing it under the couplers. I had just reached for the empty bucket, when the crash occurred. I heard a loud noise, when the end of the car on my left-hand side hit me. It hit me in the *cae*, and I grabbed the bar which operates the couplers. I was dragged about thirty yards, almost as far as Stintzi was dragged. I suffered [295] bruises on the head. I am going to see Dr. Brown, Deaconess Hospital. I have no other injuries. I got out from between the cars before they finally stopped. The crash was louder than anything I had ever heard before. They really hit the cars that time. We had not been warned by our foreman, or by any switchman, and there were no lights to

(Testimony of Allan Maine.)

warn Stintzi and I that the cars were going to be coupled into and moved. The violence came from the west. I ran west, trying to get the train stopped. I called to Idaho Davis to get the train stopped. I climbed over the couplers to reach Stintzi, who had been pulled from the track rail. I could see the leg was torn off. He made no statement how it happened. Overhead on the dock, electric lights, and I understand that the switchmen are not to move the cars we are working on until it is clear. Account I can't see the blue lights from where we were working, I don't know if they were burning, or not. I think our Foreman at the ice dock is supposed to turn on those lights when we are working on the cars there. I believe the cause of the accident was carelessness in not having the lights turned on when we worked there. We had been told the blue lights overhead protected us there. [296] Stintzi had been doing his work there in normal manner, and apparently feeling good. There is nothing further that I can add to this statement. I am unable to state names or numbers or descriptions of the cars we were working between with the slush bucket.

"I have read the above and it is correct.

(Signed) Allan A. Maine

Witnesses: A. C. Thomsen."

Statement of August 7, 1952: (Reading)

"Statement of Allan A. Maine, age 16, single,

(Testimony of Allan Maine.)

unemployed, high school student, address E 3634 Queen, Spokane, Wash., made in connection with personal injuries of Gerald R. Stintzi, icer, Addison Miller Co., Yardley, Wash., July 17th, 1952.

“Foreman Fincher gave Stintzi and I only the one set of orders, or verbal instructions, before we started to carry out the slush from the pit and dump it north of the ice dock track. Foreman Fincher did not come back to where we were carrying the slush after he gave those orders. Just when Stintzi and I started carrying out slush I [297] suggested to him that we could dump the buckets of slush right along north of the dock—between the ice dock and the cars standing on the north track there. Stintzi just declined the suggestion by saying he didn’t think the foreman would like our dumping the slush next to the dock. So, to carry out our orders from the foreman, we dumped the slush north of the cars. I know the track was blocked with cars, but I can’t say how many cars were west or how many cars were east of the door where we came out with the buckets of slush. Aside from being quite a distance to carry the heavy buckets of slush east of the doorway to go around the ends of the string of cars, that path was more or less blocked by a low removable platform from the dock to the salt car, or rather, between the salt car and the salt house located on the dock. That platform was pretty low, making it quite difficult, if not impossible, for Stintzi and I to carry the buckets under the platform. We proceeded to pass the

(Testimony of Allan Maine.)

bucket under the couplers, between the ends of two freight cars. Any claim or statement by Foreman Fincher that he told Stintzi and I not to crawl or go under the cars with the slush bucket, would not be correct. He gave us [298] no such orders. I know there were several freight cars on the track, and I know they extended eastward beyond the salt house. I know of no reason why the slush could not have been dumped next to the ice dock, instead of north of the track as ordered by Foreman Fincher. I have been attended for head injuries by Dr. Maris, of Spokane, Washington. I have not recovered from my injuries, and my injuries seem to have affected by vision. I have not worked since the accident happened.

“I read the above and it is right.

(Signed) Allan A. Maine

Witnesses: A. C. Thomsen.”

Q. (By Mr. MacGillivray): Now those are the two statements that you gave to Mr. Thomsen, is that correct? A. Yes.

Q. Now when you spoke of blue lights, Allan, in the statement to Mr. Thomsen, to what lights did you have reference?

A. Well, at the east end of the dock, at the very end, there is poles run across and there is lights across there.

Q. Are they blue lights, as you recall? [299]

(Testimony of Allan Maine.)

A. I don't know if they are blue, what color they were.

Q. Prior to the time of Gerry's accident, had Mr. Fincher, or any foreman of the Addison Miller Company, given you any instructions with reference to blue lights?

A. No one of the company ever, no, never give us any.

Q. After Gerry was injured, the night that he was hurt when you all got up on the dock, was there then quite a bit of discussion about blue lights? A. Yes, there was.

Q. Allan, you now know that there are two blue lights on the little shed at the west end of the icing dock? Do you know that now? A. Yes.

Q. When did you first see those two lights?

A. In those pictures there.

Q. Well, when was that?

A. In your office.

Q. When?

A. Last week, Monday or Wednesday.

Q. Sometime last week? A. Yes.

Q. And if you would stand down here, Allan, please, and in Exhibit No. 8 would you show the jury the two lights at the west and in the shed or on the shed at the west end of the dock which you first saw in these pictures last [300] week?

A. Right there (indicating).

Q. Had you ever seen those lights when you were working during this course of five days?

(Testimony of Allan Maine.)

Mr. Etter: Counsel, would you show these other jurors, too?

Mr. MacGillivray: Oh, I'm sorry.

Q. Would you come down here, please, Allan? The blue lights on the shed at the west end are the ones you are pointing to on Exhibit No. 8.

You can go back, Allan.

Had you ever seen those two lights on that shed at the west end of the dock during the time you were actually working there? A. No.

Q. Then, Allan, as you say in this statement, when you suggested to Gerry Stintzi that you could dump that ice between the cars and the ice dock, why did you make that suggestion, to save yourself some steps or for any purpose?

A. Just save some time and work.

Q. To save yourself some work?

A. Yes.

Q. And at that time, Gerry said, "We can't do it, we have got to follow orders?" [301]

Mr. McKevitt: This is repetition.

The Court: Yes, I think it is repetition.

Mr. McKevitt: And counsel is testifying.

Q. (By Mr. MacGillivray): Then, Allan, whether it was because of anything you had heard of blue lights or because of some other reason, did you at all times feel that you were protected while working in, on, or about cars on either Tracks 12 or 13?

Mr. McKevitt: I object to this as leading and suggestive, your Honor.

(Testimony of Allan Maine.)

The Court: I think it is, I will sustain the objection.

Q. (By Mr. MacGillivray): Allan, do you know what happened to this platform that was extending between the salt car and the salt pit that the boys were unloading salt over?

A. Well, when the train moved, well, it kind of shifted around like that (indicating) and fell down.

Q. Do you know whether anyone was on or walking across that platform when the crash came?

A. No.

Q. Did you see anybody on the ground under that platform after the crash? A. No.

Q. Do you know who you heard hollering in the salt car? [302] A. No, I don't.

Q. And from the time Mr. Fincher gave your group of John, the Canadian, Vallarano, Stintzi and yourself your instructions on the top of the dock, did you then see Fincher between that time and the time that Gerry was injured? A. No.

Q. When is the next time you saw Fincher?

A. When I went back up on the dock to tell him of the accident.

Q. That was after the accident had occurred?

A. Yes.

Q. And did I understand you didn't work out there any more after that?

A. When I went up to the top of the dock, I told him he could have his job.

The Court: He said he quit, he didn't work after that. That is repetition.

(Testimony of Allan Maine.)

Mr. McKevitt: I object to this, your Honor.

Mr. MacGillivray: That is all.

Recross Examination

Q. (By Mr. McKevitt): Referring to Plaintiff's Exhibit 9 that Mr. MacGillivray showed you, Allan, and these chunks of ice that you [303] observed there, are those salt bags? (Indicating)

A. Yes.

Q. Ice? (Indicating) A. Yes.

Q. Salt bags? (Indicating) A. Yes.

Q. And so on, clear to that end, is that right?

A. Uh-huh.

Q. What kind of cars are these (indicating)? Refrigerator cars, aren't they?

A. I don't know. This one doesn't look like a refrigerator car.

Q. What track are they on, 13 or 12? 12, are they not, on the south side?

A. This is leading east, isn't it?

Q. Yes.

A. This would be on the south side.

Q. That is the south side, isn't it?

A. Yes.

Q. It is a fact, is it not, that the only time that you have ice such as is shown on the south side of that dock and salt as is shown strung along the whole length, is when cars are in there for the purpose of being iced right at that time; isn't that true?

A. Well, it could have been on there from the

(Testimony of Allan Maine.)

crew before [304] and it could have been on the crew after, whenever this picture was taken.

Q. You do not mean to say in the month of July they were leaving big chunks of ice standing out on the platform under the sun, do you, with no cars to be refrigerated?

A. They are not going to put it back.

Q. My question was, the only time that they have ice on that platform was when they have cars there to be iced, isn't that true? A. Yes.

Q. All they have to do is start this conveyor belt, it comes up from the ice house, you pull the ice right off the belt; isn't that correct?

A. That is correct.

The Court: Any other questions of this witness?

Mr. MacGillivray: Yes, that is all.

The Court: You say there are none?

Mr. MacGillivray: No further questions.

The Court: All right, you may be excused, then. Call the next witness.

Mr. MacGillivray: Mr. Vallarano. [305]

JOE VALLARANO

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your name is Joe Vallarano? A. That's right.

Q. And where do you live, Joe?

(Testimony of Joe Vallarano.)

A. 3707 North Division.

Q. Are you married? A. Yes.

Q. Do you have a family?

A. Two children.

Q. And where are you employed?

A. I am a roofer by trade.

Q. For what company? A. Snyder.

Q. Snyder Roofing Company? A. Yes.

Q. And how long have you worked for Tom Snyder?

A. I have worked with him all this year.

Q. Mr. Vallarano, on July 17, 1952, were you employed by Addison Miller Company when Gerry Stintzi was injured? A. That's right.

Q. What work were you doing there? [306]

A. Icing cars.

Q. How long had you been working prior to that night?

A. Well, six or seven days. It was either six or seven days that I had been there.

Q. And during that six or seven days, what kind of work did you do, Joe?

A. Icing cars, icing cars on the dock.

Q. Pardon? A. Icing cars.

Q. Did you do any unloading of salt?

A. Pardon?

Q. Did you do any salt unloading?

A. Yes, I did, yes.

Q. What shift did you work? A. 3 to 11.

Q. Did you work any other shift or that shift each day? A. That shift.

(Testimony of Joe Vallarano.)

Q. Did you have some other job at the time?

A. At the time, what do you mean? Yes, I was roofing at the time, but it was between one of those jobs and I was working there during the evenings picking up a few bucks on the side.

Q. I see. Do you remember young Gerry Stintzi?

A. Very well.

Q. And you remember young Allan Maine?

A. Yes, I do.

Q. Now on the 17th of July, about what time did you come to work? A. 3 o'clock.

Q. Do you recall what you had done between 3 o'clock and when you went to supper?

A. Well, I think we iced a fruit train that come in between 3 and 7, and then around 7 o'clock we went to dinner.

Q. About 7 o'clock you went to dinner. Now going back two years, but the cars that you iced between 3 and 7, do you remember whether that was on the south side of the dock or the north side of the dock?

A. I don't know whether it was on the south or the north.

Q. It might have been both sides?

A. That's right.

Q. And that was a pure icing, car icing operation? A. Yes.

Q. And in that icing operation, you take the ice off the chain on the top of the dock, slide it across a platform to the top of the car, drop it down into the car, and then chop it up?

(Testimony of Joe Vallarano.)

A. That's right.

Q. When the car is full, you salt it and go on to the next car. Where did you have your supper that night, do you recall? [308]

A. Right down by the main office. It is right down there by the big ice house, this side of the tracks.

Q. What did you do, bring your own lunch?

A. No, there is a little grocery store up the road about three or four blocks and I had went up there with Tarnaski, the fellow from Canada, and we would buy our lunch and then come back and eat it. That is where all the fellows ate their lunch, mostly all of them.

Q. And when you got back at 7 o'clock, where did you go and how did you get back to the icing dock?

A. Well, after we got through eating, we went into the tunnel, then back up to the icing dock.

Q. When you got back up on the icing dock, were you given any instructions as to what you should then do?

A. Well, Fincher was right up there from the tunnel as we came up to the main dock, and he told—I guess he told Gerry there to take four or five men—I was there and I heard him—he told him to take four or five men and go down below and clean the slush out from on this power belt, because as it makes a turn it chops off the ice, you know, these big cakes, he told us to go down there.

Q. And then did Gerry pick a crew?

(Testimony of Joe Vallarano.)

A. Yes, he did.

Q. Who did he pick, as you recall?

A. There was Tarnaski, me and Maine and him.

Q. Now is it Tarnaski, was that his name?

A. Tarnaski, I guess that was his name.

Q. T-a-r-n-a-s-k-i, that is the way it sounds?

A. Yes, that sounds like it.

Q. You don't remember what his first name was?

A. No, I don't.

Q. Was he an American?

A. He was a Canadian.

Q. He was a Canadian. How old a fellow was he?

A. I imagine he was 42, 43, 45.

Q. And after Gerry picked the three or four of you, did Fincher then give the group, the four of you, any instructions as to how and where you should dump that ice?

A. He told us to go down there, there was a 5-gallon drum down there, 5-gallon pail, there was a shovel, he told us to shovel the ice and put it in the pail and take it across the tracks and dump it over in the rubbish pile.

Q. And that would be across what track, on which side of the dock?

A. The north track.

Q. And north of the north track you refer to a rubbish pile?

A. That's right.

Q. Did you know about that rubbish pile at the time? [310]

A. No, I didn't.

Q. Well, how do you refer to it now as a rubbish pile?

A. Well, at the time when I was down there,

(Testimony of Joe Vallarano.)

I seen they had burned a bunch of stuff there and they had dumped a bunch of stuff, so I figured it was a rubbish pile.

Q. Looked like a rubbish pile or a common dumping ground? A. That's right.

Q. And is that the rubbish pile, or seems to be a dumping ground, shown in——

A. That is it.

Q. ——in Exhibit No. 14?

A. That's right.

Q. And that is immediately north of Track 13 we have been talking about and between Tracks 13 and 14 to its north? A. That's right.

Q. And then what did the four of you do after you got your instructions from Fincher?

A. Well, we went down below, and I think I took a couple of loads with Maine and then I might have took a couple of loads with Gerry. We retaliated, we had turns. And then when Gerry was hurt, I know that me and this Canadian was down shoveling the ice and lifting it up, giving it to them.

Q. In other words, who was down filling the buckets in the [311] slush pit?

A. Tarnaski and I.

Q. And then did you carry any buckets out and get them across the track?

A. Prior to the accident, yes.

Q. Yes. How many?

A. I don't know offhand, I couldn't say. I imagine I carried a few.

(Testimony of Joe Vallarano.)

Q. It might have been a couple with Gerry and a couple with——

A. Four or five, maybe six.

Q. When you did that, Mr. Vallarano, did you stay on the south side of the coupling between the cars, or did you go through the coupling?

A. No, I went through, I think, once or twice because I remember what the rubbish pile looks like. I went through, I think, when me and Tarnaski brought it over. I handed it over, I climbed under the couplings, and then I took it over and dumped it.

Q. Now the first time you walked out of the doorway there, whether it was with Stintzi or whether with anyone, carrying this bucket, did you see a line of cars there? A. Yes.

Q. Do you know, Joe, how far they extended to the west?

A. I knew they were quite a ways, there must have been [312] quite a few cars, because I didn't feel like I wanted to carry that pail all the way up around them.

Q. Do you know how far they extended to the east?

A. I think there might have been quite a few to the east, too.

Q. How heavy was this pail when it was full of slush?

A. It must have been 25 pounds, maybe 30, 40. I imagine 25 or 30 pounds.

Q. I see. And was there any other practical way

(Testimony of Joe Vallarano.)

to get that pail full of slush over to the north side of Track 13 and dump it in accordance with your instructions except to go through the coupling?

Mr. Cashatt: I object to the form of the question, your Honor.

The Court: I think it does call for a conclusion. You can ask him how he would have to dump it if he didn't go through.

Q. (By Mr. MacGillivray): Well, how did you fellows happen to use the coupling to go between the cars in order to get to the north side of Track 13?

A. Well, one of us would have to crawl under; he would get on the other side; then the one on the south side of the track would swing it under the coupling to him, and then he would take it over and dump it.

Q. Well, how did you happen to decide to go through the [313] coupling?

A. Well, that is the only way we could get through there to dump the rubbish.

Q. And in doing—— A. I mean the ice.

Q. And in doing that, were you following out what you understood to be Foreman Fincher's instruction? A. That's right.

Mr. Cashatt: I object to that and move it be stricken. There is no evidence here that Fincher ever instructed him.

The Court: Well, I will let it stand. It is leading but it has been said by others.

Q. (By Mr. MacGillivray): How long, Mr. Val-

(Testimony of Joe Vallarano.)

larano, if you recall, had you been engaged in this slush operation before the accident happened?

A. Oh, I don't know, maybe a half hour, three-quarters of an hour, possibly an hour.

Q. Do you know how many buckets of slush had been carried out and dumped and carried back?

A. No, I couldn't say exact.

Q. What time of night was it, as you recall, when the accident happened?

A. I think the big lights were on.

Q. Pardon? [314]

A. I think the big lights was on. It must have been close to about 8:30.

Q. About 8:30. And what was the visibility outside? Was it daylight, dusk or dark? A. Dusk.

Q. And where were you, Mr. Vallarano, when you heard the crash and the accident occurred?

A. Into the slush pit.

Q. In the slush pit? A. Yes.

Q. You were in the building itself, then?

A. Yes.

Q. Well, just tell the jury what you heard and what you did.

A. Well, Stintzi and this boy Maine had taken out the pail and then I heard these cars banging together and then I heard Stintzi screaming. He must have screamed maybe four or five times, I couldn't say for sure, so I knew that somebody must have got hurt, and I ran up the stairs and ran up the main dock, right up to the top of the dock, and I jumped from the dock on to the cars.

(Testimony of Joe Vallarano.)

They were still running, but they were just slowing up. And I looked on the other side of the cars down, you know, down below——

Q. Not so fast now. You ran up on to the dock?

A. Yes.

Q. To the top of the dock? A. Yes.

Q. Is there a stairway leading from where this slush pit is up to the top of the dock?

A. Yes, there is, that is the main stairway.

Q. And then when you got on the top of the dock, what did you do?

A. I jumped on to the cars.

Q. On top of one of the cars? A. Yes.

Q. And was that car still moving?

A. It was going slow, yes.

Q. And then what happened?

A. Then I looked over, and from the time I jumped from the dock on the car, the car was going slow and it stopped, and I looked over on the other side of the car down below and there was Gerry laying down there. He had been, I guess, thrown.

Q. Tell the jury what you saw down there.

A. Well, I saw him lying down there, his head was facing north and his leg was completely off up here at the hip, and his—well, you know, it is hard to explain, looked awful, I know that, and I heard him moaning and screaming down there, and that is about it. [316]

Q. Well, then what did you do?

A. So I guess some fellows up on the dock didn't even know what had happened, and then I ran

(Testimony of Joe Vallarano.)

back down through the tunnel, I ran up to the main office of Addison Miller, and I phoned up the Emergency Hospital here in town and I told them I would wait out by the main road right there in front of the big ice house and I would wait for them and I would give them directions showing them how to get in there. And so I was waiting there, two cars, the County Sheriff had got there and then the city ambulance from the police station had got there, too, about the same time, so I jumped in with the city ambulance and we went up some road, I don't know, over the bridge leading over to Trent, then we came back and they couldn't get in because there was so many cars, you know, in the way there. So I took this intern, a doctor, and brought him back, brought him to where Gerry was. We ran in between the cars and got back there where Gerry was laying.

Q. And was Gerry still there on the ground beside the car? A. Yes.

Q. What was his condition then, Joe?

A. Looked very bad.

Q. What was he doing?

A. He was praying at the time. I think some other fellow [317] was holding him. He thought his arms were cut off, he kept on repeating that he had lost his arms, and he was praying, wanted to see his dad. I don't recollect too well, he wanted to see his dad or his mother, he wanted them right away.

Q. And he was praying, did you say?

A. Yes, he was.

(Testimony of Joe Vallarano.)

Q. And was the doctor or intern with you at the time?

A. Yes, the doctor, the intern, I imagine, I think it was the intern, was right there with me at the time.

Q. Was Gerry bleeding a lot?

A. Oh, bleeding, boy, you know it. His leg was — I think there must have been just about two or three inches of skin that was holding his leg. It was completely severed from his bone. His bone was sticking out of his hip, you know, socket bone about that long (indicating) sticking out. The leg was completely turned over to the side and he had rocks and gravel in his face and in his side, his arms.

Q. Did you notice his right arm?

A. They were both broke, I think. He thought they were both cut off, he thought he had lost them.

Q. How about his left leg?

A. His left leg? Didn't notice that too much, the only thing I noticed was his right leg, the one that was gone. [318]

Q. I presume he was in considerable pain?

A. I didn't think he had a chance.

Q. Was he conscious?

A. Yes, he was conscious.

Q. Now you had worked there about six or seven days?

A. Yes, I guess it must have been about that, I imagine, it might vary a day or so.

Q. I think I asked you, I forget whether I

(Testimony of Joe Vallarano.)

asked you or Allan, did you work that same 3 to 11 shift? A. Yes.

Q. Now, Mr. Vallarano, at any time during that 7-day period, when there were cars spotted and standing on either Tracks 12 or 13 and any of the Addison Miller crew was working on the dock, in, on, or around those cars, had you ever seen cars come drifting in unattended from east or west on either Tracks 12 or 13?

Mr. Cashatt: I object to that question, your Honor, as leading and to the form of the question.

The Court: Well, overruled, he may answer.

A. Well, I don't know, I can't say about that.

Q. (By Mr. MacGillivray): Well, had you ever seen it to your recollection? A. No.

Q. And, Mr. Vallarano, when you carried out the slush bucket with either Stintzi or Maine and crawled under [319] the coupler yourself, did you expect that any of those cars standing there would be moved?

Mr. Cashatt: I object to that.

The Court: Yes, I will sustain the objection.

Q. (By Mr. MacGillivray): Do you recall the string of lights on the top of the icing dock?

A. Yes.

Q. Have you seen these pictures?

A. No.

Q. Handing you what is marked as Plaintiff's Exhibit No. 9, which is a picture taken on the top of the icing dock looking from the westerly little shed in an easterly direction, do you recall that?

(Testimony of Joe Vallarano.)

A. Yes.

Q. Do you recall those overhead lights?

A. Uh-huh.

Q. Down the north and south sides of the dock?

A. Yes.

Q. Were those lights illuminated when you ran up on the dock and jumped from the dock over on to that moving car?

A. I think they were on, yes.

Q. Well, are you sure they were on?

A. Pretty sure, yes.

Mr. Cashatt: What is the exhibit number? [320]

(Exhibit 9 handed to Mr. Cashatt.)

Q. (By Mr. MacGillivray): And, Mr. Vallarano, when you were working down there in that ice pit and out adjacent to Track 13 and even across Track 13, did you at any time then have any reason to anticipate that any of those cars would be moved?

Mr. Cashatt: I object to that.

The Court: I will sustain the objection on that.

Mr. MacGillivray: You may examine.

Cross Examination

• Q. (By Mr. Cashatt): Now, Mr. Vallarano, you say you had worked there for six or seven days? A. Yes.

Q. And had most of that work been on the ice dock itself? A. Most of it, yes.

Q. And when you were up on the ice dock, Mr.

(Testimony of Joe Vallarano.)

Vallarano, you could see practically the entire switch yard, isn't that correct?

A. That's right.

Q. If you looked to the north, you could see the general yard as far as it goes to the north, couldn't you?

A. Yes, that's right.

Q. And you can look to the south and see the general yard [321] as far as it goes to the south?

A. Yes.

Q. The same is true of the east and the same is true of the west, isn't it?

A. Yes.

Q. Now while you were there those six or seven days before this accident happened, you saw switch engines moving cars from one place to the other in that yard, didn't you?

A. Yes.

Q. And you saw switch engines bringing cars down the main and cars being uncoupled and cars drifting down the certain switch tracks, didn't you?

A. That's right.

Q. That was a common practice out there, wasn't it?

A. Uh-huh.

Mr. MacGillivray: Speak up, Joe.

A. Yes.

Q. (By Mr. Cashatt): It was a common practice on all of the tracks in that Yardley switch yard, wasn't it?

A. I wouldn't say all of them; I don't think it was a common practice on 13 or 14, whatever those two rip tracks were along that loading dock.

Q. Well, say, Mr. Vallarano, when there were no cars in there for icing and being iced on 12 or 13, you have [322] seen them switch cars, just gen-

(Testimony of Joe Vallarano.)

eral freight cars, unloaded boxcars, tankers, and so on and so forth, you have seen them switch those in on 12 and 13, haven't you?

A. No, I haven't, not on 12 or 13.

Q. How much time did you put in on those six or seven days out on that icing dock?

A. When there wasn't no ice cars back up there to ice, used to go back to the main icing shed, sit there in the shed, sit there for two or three hours at a time. When a fruit car came in, come back up to the dock.

Q. On an average on an 8-hour shift, how many hours did you usually spend during those six or seven days out on the icing dock itself?

A. Well, it all depends on how many fruit cars come in.

Q. Well, on the average?

A. Well, I couldn't say.

Q. Four hours?

A. Might have been four, maybe five. I know we done a lot of loafing, too.

Q. Yes, but my question was approximately how much time did you spend on the icing dock?

A. Well, I couldn't say for sure.

Q. Well, would it be fair to say an average of four to five hours a day out on the dock itself?

A. That might be it.

Q. And when you were out on that dock, what would you hear, what was the general noise that you could hear throughout that yard?

(Testimony of Joe Vallarano.)

A. Well, you could hear those engines being switched.

Q. You could hear the switch engines at work, could you? A. Yes.

Q. And you could hear one car bumping in and coupling to another car, couldn't you?

A. That's right.

Q. In fact, you hear that just constantly out there, don't you? A. That's right.

Q. In fact, you hear it so much it is practically the rhythm of that yard, isn't that right?

A. Right.

Q. And one couldn't be out in that yard on that ice dock over five minutes without being very familiar with that particular sound, could you?

A. I guess that's right, yes.

Q. Well, that is right, isn't it, sir?

A. Yes.

Q. And when you hear that sound, you know that boxcars are being pushed down tracks and that they are coming in contact with other freight cars? [324] A. That's right.

Q. That is what you know, isn't it?

A. Yes.

Q. And whatever you call it, oh, say, at times, Mr. Vallarano, just throughout all of the time like when you were on this dock four or five hours a day, you could see cars stationary on these various tracks, couldn't you, you could see them sitting?

A. That is correct.

Q. Freight cars? A. Yes.

(Testimony of Joe Vallarano.)

Q. And then you would see single cars or one or two cars being rolled down the track and bumping into those stationary cars?

A. That's right.

Q. You saw that, didn't you? A. Yes.

Q. And you saw that same thing on Track 13 when cars weren't being iced on that track?

A. I never seen that on Track 13.

Q. Did you see them make up trains there practically every day, the trains that were going to be pulled east?

A. I didn't watch to see them make up trains. I knew that they were doing a lot of switching out there, though.

Q. And now as far as this particular night is concerned, [325] Mr. Vallarano, when you got down to the area where you were taking this slush out of the pit, who was the first one that went across Track 13 with a bucket of this slush?

A. Can't say for sure.

Q. You don't know, sir, whether it was you?

A. It might have been me, might have been Stintzi, might have been either one of us.

Q. At any time, Mr. Vallarano, did you go across that track under those couplings yourself?

A. Yes.

Q. Are you sure of that?

A. Positive of it.

Q. How many times did you go under those couplings yourself?

A. I wouldn't ask how many times I went under,

(Testimony of Joe Vallarano.)

but I know I must have went under two or three times, maybe four.

Q. That particular night?

A. That was the only night that I ever dumped slush, yes.

Q. That was the only night that you ever dumped slush? A. Yes.

Q. Do you remember giving a statement to Mr. Thomsen, the claim man of the Northern Pacific Railroad, on July 18, 1952, the day after this accident occurred?

A. Yes, I think I did, he came up to my place and took a [326] statement.

The Clerk: Defendant's 19 for identification.

Q. (By Mr. Cashatt): Handing you Defendant's Exhibit No. 19 for identification, Mr. Vallarano, is that your signature, sir, on Page No. 1?

A. Right here (indicating).

Q. Will you please look at it?

A. Yes, that is my signature.

Q. And on Page No. 2, would you please see if that is your signature? A. Yes.

Q. And is the other statement right above your signature in just writing, "I have read the above statement and this is the truth (2 pages)," is that your writing there, sir? A. Yes.

Mr. Cashatt: I will offer Defendant's Exhibit No. 19 and be glad to read the entire statement to the jury.

Mr. MacGillivray: No objection.

Mr. Etter: No objection.

(Testimony of Joe Vallarano.)

Mr. Cashatt: Or just the parts that are material.

The Court: It will be admitted. [327]

(Whereupon, the said statement was admitted in evidence as Defendant's Exhibit No. 19.)

Q. (By Mr. Cashatt): Mr. Vallarano, in that statement that has now been admitted in evidence, do you remember making the following statement to Mr. Thomsen, the Northern Pacific claim man:

"I never did go under the couplers, but went right up to the couplers to hand the bucket to Stintzi on two occasions before the accident and while during this time and while doing this work, I depended upon the fact that I thought these cars were frozen by blue light as was the usual custom when men worked about the cars."

Do you remember making that statement?

A. It has been two years ago, I don't think I remember, but I know that I went under that coupling.

Q. Well, now, Mr. Vallarano, you think that your memory would be better today as to that fact than it would have been on July 18, 1952, the day after the accident?

A. Well, I don't remember a lot of things that happened two years ago, if that is what you mean.

Q. I appreciate that, sir, but on this particular fact concerning this particular accident, don't you

(Testimony of Joe Vallarano.)

think that your memory the morning after the accident would be better concerning the facts of the accident than it would be today?

A. Yes, I do.

Q. Now, Mr. Vallarano, when you came up on the dock after this accident happened, I believe you stated that the cars were still in motion, is that right, sir? A. That's right.

Q. And when you did that, Mr. Vallarano, I believe when you got up to the dock you took a look to see if the blue light was out on Track 13 and to see whether or not it was on, is that right?

A. No, I didn't.

Q. You didn't do that, sir?

A. I did after they taken Stintzi away. That might have been maybe three-quarters of an hour after that they were talking about the blue light being off.

Q. And you know that the blue light was not on at the time this accident happened?

A. I don't know whether it was on when the accident happened.

Q. Well, now, while the cars were still moving, you took a look to see whether or not the blue light was on? [329] A. No, I didn't.

Q. You didn't?

Mr. Cashatt: Your Honor, I would like to read the entire statement to the jury.

The Court: All right.

(Testimony of Joe Vallarano.)

Mr. Cashatt: (Reading)

“Spokane, Washington, July 18, 1952

“Statement of Joe Vallorano, age 30, address 120 E. Pacific, Apt. C, phone none, occupation iceman, employed since about July 7, 1952 by Addison-Miller Co., made in connection with injuries to Gerald Stinzi, iceman, Yardley, Wn., July 17, 1952 at about 8:15 p.m.

“I was working on the 3:00 p.m. to 11 p.m. shift at Addison-Miller Co. ice plant and ice dock at Yardley, Wn. on July 17, 1952. At about 6:30 p.m. we finished icing a fruit train on track 12 south of the ice dock and then we had lunch time for about an hour. Sometime during lunch time, the railroad put a number of cars in on track 13 and I don't know how many cars were put in on the track but it was a long string running quite a ways to the west from the ice dock. These were freight cars and were not refrigerator cars for icing. [330] After we returned to work after lunch at about 8:00 p.m. Fincher, the foreman, told four of us to stay and clean out the slush in the bottom of the ice dock. Stinzi, Maine, John Tornasky and myself were to do this work and Tornasky went down in the hole to pick up the slush and put it in the bucket, a 5-gal. bucket, and he would hand it up to me, and I would then hand it to Maine and Stinze and then they would carry it to the track and then one of the men would crawl under the couplers between two cars, freight cars, and then the other would

(Testimony of Joe Vallarano.)

hand it to him and he would dump it and then hand the bucket back and then the fellow would crawl back under the coupler and go to get another bucket full. Stinze and Maine and I traded off, two at a time, doing this work, and after we had done about 4 or 5 loads, ten or 15 minutes at the most, I was sitting in the doorway leading from the tunnel and Tornasky was in the ice dock and Maine and Stinze had gone to dump a bucketfull of ice. Stinze had gone under the coupler and Maine had handed the bucket to him under the coupler and the bucket was dumped by Stinze, I believe, and while he was handing the bucket back, as I understand it, I heard a loud [331] noise or coupling, which indicated a very violent joint, and the cars that had been sitting there rolled slowly to the east and they rolled about 35 or 40 feet and then stopped. I heard screams from someone and there were about 4 or 5 or 6 or 7 screams in all and then knew something was wrong so I ran to top of dock and onto top of cars and looked down and there saw Stinze lying on the north of the north rail of this track and he appeared badly hurt with one leg amputated or nearly off and after I went down about halfway on the ladder I knew he needed help in a hurry so I went back to ice dock, back through the tunnel and ran to the office and called the operator and asked for emergency help at the plant. I then waited at the office in order to direct help when it arrived. It was dusk at the time of accident and there were lights on top of the dock but these did not give

(Testimony of Joe Vallarano.)

much light to where we were working. The weather was clear and visibility good. Fincher told us when we started 'Clean out the slush and put it in a can and carry it across the track and dump it' and that is all he said and he did not say anything about how to go across the track. Since there was no break in string of cars on track, we went under [332] to dump the slush. It was my understanding while working there that when cars were on this track blue light on top of ice dock at west end would be lighted to warn switchman of men in cars and it was our impression that this light was lighted at time we were working cleaning out this slush and going across the track under the couplers of these cars on this track. We had no idea that there would be any cars coming in on this track. I know that just after the accident, when I ran up on the top of the dock that the blue lights on west end were not on and had not been on at time of accident as Stinze was still being dragged at time I went to top of the dock. I don't know why these lights were off but most likely they were not on while we were at lunch and no one turned them on again after lunch. I never did go under the couplers but went right up to the couplers to hand the bucket to Stinze on two occasions before the accident and while during this time and while doing this work I depended upon the fact that I thought these cars were frozen by blue light as was the usual custom when men worked about the cars.

(Testimony of Joe Vallarano.)

“I have read the above statement and this is the [333] truth (2 pages).

(Signed) Joe Vallorano

Witness to signature: Mac M. McGrew.”

Q. And it is true, Mr. Vallarano, that when you gave this statement on July 18, 1952, that your mind at that time concerning this accident was fresher than it is at the present time, isn't that right?

A. I was pretty excited at that time, too.

Q. Yes.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Mr. Vallarano, as I gather in this statement, you state that you didn't go under the coupler but you went right up to the coupler. Your recollection is now that you went under the coupler. Which is correct?

Mr. Cashatt: I object to that.

A. I went up to the coupler.

Mr. Cashatt: Cross examination of his own witness.

The Court: I will overrule the objection. You may state that.

Q. (By Mr. MacGillivray): Which is correct?

A. I went under it, both under it and up to it.

Q. Well, in going up to the coupler to hand the bucket through to whoever might have been on the other side, were you directly between two cars?

(Testimony of Joe Vallarano.)

A. Yes.

Q. Then, Mr. Vallarano, in the statement you state: "It was my understanding while working there that when cars were on this track blue light on top of ice dock at west end would be lighted to warn switchman of men in cars and it was our impression that this light was lighted at time we were working cleaning out this slush and going across the track under the couplers of these cars on this track. We had no idea that there would be any cars coming in on this track."

Is that correct?

A. That is correct.

Q. Did you at that time, in view of your knowledge of the blue light, think there was any danger in either going up to the coupler or under the coupler?

Mr. Cashatt: I object as calling for a conclusion.

The Court: Yes, I will sustain the objection to that. What his opinion was is not material.

Q. (By Mr. MacGillivray): Well, what did you mean by this, insofar as your own safety was concerned, when you made the statement: "We had no idea that there would be any [335] cars coming in on this track?"

Mr. Cashatt: Same objection, your Honor.

Mr. MacGillivray: I think he can explain this, your Honor.

Mr. Cashatt: The statement speaks for itself.

The Court: What was your question again?

(Testimony of Joe Vallarano.)

Mr. MacGillivray: I've forgotten. Would you read it, please?

(The question was read.)

The Court: All right, overruled, you may answer that.

A. Well, I took it for granted if they were working on top of the cars there, there wasn't going to be any cars sent in there; as long as they were working around the freight cars, that we were pretty safe.

Q. (By Mr. MacGillivray): How old are you, Mr. Vallarano? A. 32.

Q. Were you in the service? A. Yes.

Q. Now, Mr. Vallarano, before this violent crash and you heard Gerry start to scream, did anyone give you, Mr. Tarnaski, Mr. Stintzi, or Mr. Maine, any warning of any kind that cars were drifting in on Track 13?

Mr. Cashatt: I object to that. It is not proper redirect. [336]

The Court: Overruled.

The Witness: Do you want me to answer?

Mr. MacGillivray: Yes.

A. No, they didn't.

Q. And counsel asked you several questions about it being common practice out there to switch cars on different tracks and let them come into contact on other tracks; you said that was common practice?

A. Yes, I have seen that happen around there, around the yards.

(Testimony of Joe Vallarano.)

Q. Did you ever see that happen on either Tracks 12 or 13 when Addison Miller had a crew working on and about that icing dock?

A. No, I didn't.

Q. How many men were there, approximately how many men on one of these icing crews?

A. Couldn't say for sure, I never did count them.

Q. Well, I don't mean to be exact?

A. Well, I figure there was about 25 or 30.

Q. 25 or 30.

Mr. MacGillivray: That is all. [337]

Recross Examination

Q. (By Mr. Cashatt): Mr. Vallarano, counsel asked you about being in the service. Mr. Vallarano, isn't it correct that on September 19, 1944, that you were convicted of desertion from the service at Camp Wood, Texas and given five years?

A. That is wrong, it is not '44, it is '43.

Q. '43, sir? A. '42.

Q. '42?

A. That's right. But it wasn't desertion.

Q. What was it?

A. I got in a little trouble with a lieutenant.

Mr. McKevitt: First or second?

Q. (By Mr. Cashatt): Did you see anybody working on top of any of those cars while you were carrying out this slush operation?

A. No, I didn't.

Q. And I notice that counsel has not asked you whether or not you saw any salt being unloaded.

(Testimony of Joe Vallarano.)

Did you see any salt being unloaded there?

A. Well, I didn't notice any salt being unloaded, probably because I didn't look at the right where the salt bin was. [338]

Q. You didn't see any, anyway?

A. Well, I didn't look that way. I didn't see any salt, I seen the platform there, but I didn't see any salt going back and forth, guys walking back and forth, if that is what you mean.

Q. See any lights running from the salt pit to the boxcar or anything like that?

A. I don't remember that.

Q. Did you see any platform across there?

A. Yes, I think I seen a platform, I'm not sure.

Q. When did you see that?

A. When we were cleaning out the slush out of the pit.

Q. Well, after you had carried several buckets across the track, how long after you started cleaning out the pit did you see any platform over there?

A. I don't know, might have happened when I started to carry maybe the first bucket, the second.

Q. Where was that platform from where you were carrying out the slush, the door you were coming out of?

A. To the right, to the east of the door.

Q. And what kind of cars were on the tracks there, Mr. Vallarano, right in front as you came out of the door?

A. Couldn't say that. I think they were freight cars.

(Testimony of Joe Vallarano.)

Q. Were they cattle cars, sir?

A. Well, I don't know, they might have been freight cars. [339] I don't know whether they were cattle cars or not.

Q. And how far was the platform to the east from the place that you were coming out?

A. I don't remember that.

Q. Well, could you say it was one car length or two car lengths?

A. Can't even say that.

Mr. Cashatt: That is all.

Mr. MacGillivray: That is all, Mr. Vallarano.

(Witness excused.)

Mr. Etter: Mrs. Boyle, please.

NORA BOYLE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Just be seated, Mrs. Boyle. It is quite difficult to hear here in this courtroom, all the jurors have to hear what you say, so will you speak up loudly so that I can hear what you have to say back here and then everybody can probably get it?

A. Uh-huh.

Q. Will you state your name, please?

A. My name is Nora Boyle. [340]

Q. And where do you live?

A. I live at 1424 West 10th, Spokane.

Q. How long have you been a resident here in Spokane?

(Testimony of Nora Boyle.)

A. Oh, I would hate to say. It has been a long time, since I was a little girl.

Q. It has been over 15 years, hasn't it?

A. Oh, yes, it is over 15.

Q. What is your profession or occupation, Mrs. Boyle?

A. I am a graduate registered nurse.

Q. And you graduated from what school of nursing?

A. Sacred Heart School of Nursing.

Q. And you have been practicing your profession as a registered nurse for about how many years? A. Well, at least 30 years.

Q. For about 30 years? A. About.

Q. And have you maintained, I mean, quite a regular schedule of employment as a registered nurse?

A. Well, part of the years I was out of nursing, I was married. My husband passed away ten years ago, I went back in the nursing service again.

Q. You have been back in it constantly since that time? A. Ten years, yes.

Q. Ten years?

A. The last ten years. [341]

Q. Tell me, in your work, Mrs. Boyle, do you serve on any particular type of case?

A. I have served on practically every type of case.

Q. I see.

A. That comes into a hospital.

Q. And those cases include sicknesses, illnesses?

(Testimony of Nora Boyle.)

A. Sickness, accident.

Q. And all types? A. All types.

Q. I will ask you this, have you had a considerable bit of work on cases of an ill or injured classification where the case was particularly critical?

A. Well, yes, I have had, I have had accident cases that have been critical, but shall I say it, that in all my years of nursing, the case of Gerald Stintzi was the most serious one that I had ever nursed.

I took care of Gerald for about 9 weeks when he was most critical. I saw him at death's door. I have seen others just as ill as he and hurt, but they did not survive, they passed on. Gerry was one of the fortunate ones to have lived.

Q. You met Gerry Stintzi about a week or so, did you, after he came into the hospital?

A. Yes, I think it was five or six days after he came in. The nurse that was doing special duty with him had an [342] appointment with an office position and I took her place.

Q. Mrs. Boyle, during your work as a nurse and in cases in which you handled accident cases, have you had occasion to observe a great deal of pain and suffering? A. Oh, definitely.

Q. What is your opinion with respect to the case of Gerry Stintzi compared with other cases you have worked on?

A. Well, I think he suffered more——

Mr. Cashatt: Objection——

The Court: Just a minute. I don't think a com-

(Testimony of Ray Davis.)

Q. And are you working now? A. No.

Q. I think you just came back from Fort Lewis, didn't you? A. Yes.

Q. How long ago?

A. Ever since last Saturday.

Q. You came back last Saturday?

A. Yes.

Q. Now, Ray, you know Gerry Stintzi?

A. Quite well.

Q. How long have you known him?

A. About ever since I was a sophomore in high school.

Q. Were you in the same grade as Gerry in high school?

A. No, I was a year ahead of him.

Q. You were a year ahead of him. And did you engage in athletics in high school? A. Yes.

Q. What did you do?

A. I played football and a little basketball and baseball and track.

Q. And did you know Gerry as a freshman?

A. Yes.

Q. When he was a freshman. And was he engaged in athletics then? A. Yes. [346]

Q. And in his sophomore year?

A. In his sophomore year I knew him better.

Q. Better as a sophomore? A. Yes.

Q. Do you remember the evening he was hurt?

A. Quite well.

Q. July 17, 1952?

A. I don't know what date it was.

(Testimony of Ray Davis.)

Q. But you remember the night?

A. Yes.

Q. Now were you working at Addison Miller Company out at Parkwater or Yardley the night that Gerry was hurt? A. Yes.

Q. How long did you have a job out there, Ray?

A. About five or six days.

Q. Did you go to work the same day that Gerry did? A. Yes.

Q. Did the two of you apply for work together, or do you remember? A. Yes.

Q. Oh, you and Gerry went down together and got a job? A. Yes.

Q. And started out the same afternoon?

A. Yes.

Q. And did you always work on the same shift, this 3 to 11 [347] shift? A. Yes.

Q. Did you know they had other shifts other there around the clock? A. Yes.

Q. But you always worked on just the one shift, is that it? A. Yes, 3 to 11.

Q. How long had you worked, you and Gerry worked, as you recall, before he was hurt? How many days?

A. I couldn't give you no definite number.

Q. About a week or less than a week or more than a week?

A. Well, I would say at least a week.

Q. About a week. Now during that week, Ray, did you do everything out there, ice cars and carry out salt and salt cars, and so on? A. Yes.

(Testimony of Ray Davis.)

Q. Did you work any over in the ice plant, or was all your work out by the dock?

A. All my work was up on the dock.

Q. About how many fellows were there on this 3 to 11 crew, as you remember it?

A. Well, I couldn't remember.

Q. What were you, about 19 years old then?

A. Yes.

Q. Gerry was 17, remember? [348]

A. He was 16 or 17.

Q. Yes. Did you know Allan Maine?

A. Yes.

Q. Were there any other young fellows like Allan and Gerry working out there on the crew, or were most of them older?

A. Well, there was quite a few young guys out there.

Q. A bunch of kids and some older fellows?

A. That's right.

Q. Now on the evening that Gerry was hurt, do you remember buying a supper or lunch?

A. No, I don't remember going, no.

Q. Do you remember what time you had supper?

A. I would say at least about 8 o'clock.

Q. Pardon?

A. I would say at least at 8 o'clock, but I don't remember going.

Q. By 8 o'clock? A. Yes.

Q. Do you remember where you ate that night?

A. No.

Q. And do you remember, Ray, what you had

(Testimony of Ray Davis.)

done that day from 3 o'clock until you did go to lunch or supper?

A. No, not until I went in the salt pit.

Q. Do you remember, Ray, getting back after lunch and going [349] up on the dock?

A. No.

Q. Do you remember what you were doing at the time that Gerry was hurt? A. Yes.

Q. What were you doing?

A. Oh, we had took about a 10 minute break and I was standing out between the salt pit and the boxcar. That is when the cars hit together.

Q. Well, what had you been doing before you took a break?

A. Oh, I had been unloading salt from the boxcar over to the elevator and sending it upstairs.

Q. Have you seen these pictures, Ray?

A. Some of them.

Q. You have seen this one, haven't you, Ray, Exhibit 16, which shows part of the ice house and the salt dock? A. Yes.

Q. Now would you just step down here, Ray, and show the jury about where you were working prior to the time that you took this 10 minute break?

A. I was either working at one of these slots here (indicating), I can't say which one.

Q. Either the slot to the west of the elevator or the slot to the east of the elevator?

A. One of those slots, but I can't say for—

Q. You are not sure?

(Testimony of Ray Davis.)

A. I'm not sure.

Q. Then you had been unloading salt into the salt pit? A. Yes.

Q. What had you done around the elevator?

A. Oh, I had kept loading it on to the elevator, too.

Q. And they were shooting salt upstairs in the elevator? A. Yes.

Q. Then about 10 minutes before this crash occurred, you had taken a break, as you call it?

A. Yes.

Q. And during this 10 minutes, what were you doing? A. Well, I was standing——

Q. Stand around so everybody can see us, Ray, here.

A. I was standing in between one of these slots, like I said, between the track and the pit. That is when the cars came together and it scared me so bad I ran back inside.

Q. Well, in other words, you were standing in the space between the salt building itself and the cars on the track? A. Right.

Q. Right next to it. Were you smoking or——

A. No, I don't smoke.

Q. You don't smoke? [351] A. No.

Q. Just standing there taking a rest?

A. Yes.

Q. Then you can sit back there.

As you were standing there, Ray, about how far were you from those boxcars on the track there?

(Testimony of Ray Davis.)

A. Not very far, I can tell you that.

Q. Well, can you tell me about how far you were?

A. About that distance (indicating).

Q. About this distance?

A. Yes.

Q. From the cars themselves?

A. Yes.

Q. And as you were standing there, what happened, Ray?

A. Pardon?

Q. As you were standing there, what happened?

A. That is when the cars hit together. Then I heard somebody scream.

Q. Did you say you got scared?

A. Yes, I ran back inside.

Q. You ran back inside of the door by the elevator?

A. Yes.

Q. And then you heard someone screaming?

A. Yes.

Q. What did you do then? [352]

A. I just stood there for a minute, about five minutes, I would say, Allan come running down the tracks yelling "Gerry got hurt."

Q. Did you go over to where Gerry was?

A. I went up on the dock.

Q. You went up to the dock?

A. Yes.

Q. When you got up on the dock, Ray, do you remember the white lights running down each side of the dock?

A. Yes.

Q. Were they lit?

A. Yes. the white lights.

Q. The white lights?

A. Yes.

Q. And then after you got up on the dock, did you go over to where Gerry was on the ground?

(Testimony of Ray Davis.)

A. No, I could see him from the dock, but it was quite a few men standing around but you couldn't see him very good, but I saw him down there.

Q. You didn't go down yourself?

A. No.

Q. And how long did you stay around there that night after Gerry was hurt?

A. Until they carried him off.

Q. And did you work any more that night?

A. No.

Q. Did you go back any more then?

A. No.

Q. So you just worked this week or so, then?

A. Frankly, I quit that night.

Q. Quit that night. Now, Ray, as you were unloading the salt cars and as you were loading salt into the elevator and as you were standing immediately beside the salt car and between the salt car and the salt bin, before the crash occurred, did you receive any warning from anyone that cars were drifting down that track and there was going to be a crash? A. No.

Q. Did you know anything about these blue lights, Ray? A. No.

Q. Anyone ever tell you anything about blue lights? A. No.

Q. And, Ray, during the time that you worked there before Gerry was injured, had you at any time seen cars floating in on either Track 13, which is north of the ice dock, or Track 12, which is south

(Testimony of Ray Davis.)

of the icing dock, while you fellows were working on the icing dock or in the cars or on the cars or around the cars?

Mr. Cashatt: Object, your Honor, it is leading. This whole line has been. I hate to object all the time. [354]

Mr. MacGillivray: I don't think that is a leading question.

The Court: Well, I will overrule the objection.

The Witness: Would you repeat that again?

(The question was read.)

A. I didn't notice what track they was on, just heard a train. I didn't know what track it was on.

Q. You didn't know the track numbers?

A. No.

Q. What I mean, Ray, at any time while you were there, when you boys were working either icing cars or taking salt out of the cars, as you were that night, or working any place around the cars, had you ever seen other cars come in and jam into and bump those cars?

Mr. Cashatt: Object to the form of the question.

A. No.

The Court: Well, the answer may stand.

Mr. Cashatt: About three or four questions.

Mr. McKevitt: About three or four questions in one.

The Court: Yes, I know.

Mr. MacGillivray: You can break them down on cross examination.

That is all.

The Court: Court will adjourn until tomorrow [355] morning at 10 o'clock.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Wednesday, June 30, 1954.) [356]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Mr. Davis was on the stand. Will you come forward, please, Mr. Davis?

RAY DAVIS

having previously been duly sworn, resumed the stand and testified further as follows:

The Court: All right, proceed.

Mr. Cashatt: You had finished?

The Court: Have you finished direct examination?

Mr. MacGillivray: Yes.

Cross Examination

Q. (By Mr. Cashatt): Mr. Davis, you stated that you had known Gerry for a number of years, is that right? A. Yes.

Q. Before this accident happened?

A. Not too many years, I would say one year, at least.

Mr. MacGillivray: Ray, you speak up now, will you [359] please?

Mr. Cashatt: And what was your last answer, Mr. Davis, I didn't hear it?

(Testimony of Ray Davis.)

A. I say, at least one year.

Q. About one year before the accident?

A. Yes.

Q. And you both went out in July, 1952, and went to work for Addison Miller at the same time, is that right?

A. Yes.

Q. And at the time of the accident, Mr. Davis, at the time you went to work and at the time of the accident, was Mr. Stintzi living at your house?

A. Yes.

Q. How long had he been living at your house?

A. I couldn't say.

Q. But at the time you went to work and the time the accident happened, he was, is that right?

A. I say at least two weeks, anyway.

Q. About two weeks. Now you have told us that you came to work on that day, Mr. Davis, on July 17, 1952, at about 3 o'clock, is that right?

A. That's right.

Q. And upon going to work on that shift at 3 o'clock, did you go directly over to the ice dock?

A. Yes. [360]

Q. And now between 3 and 4 o'clock, Mr. Davis, you and the other members of the crew brought salt up from the salt pit; you did that, didn't you?

A. We did that, but I don't know what time.

Q. But you did do that? A. Yes.

Q. After going to work that day, when you got over there you began moving ice up from the ice house up the conveyor on to the icing dock, didn't you?

A. No.

(Testimony of Ray Davis.)

Q. You didn't do that? A. No.

Q. Well, were you there, Mr. Davis, on the dock at 4 o'clock that afternoon, July 17, '52?

A. I don't know. I was there, but I don't know of no definite time.

Q. Well, were you there at the time that the Northern Pacific fruit train Extra No. 51 east-bound, consisting of 55 refrigerator cars, was divided and spotted on Tracks 12 and 13?

A. I didn't see the cars come in.

Q. But did you see that train that I have referred to, the 55 cars, on Tracks 12 and 13 during that afternoon after you got to work, after 3 o'clock? A. No. [361]

Q. You didn't see that? A. No.

Q. Well, between 3 o'clock, Mr. Davis, and when you went to lunch, not putting it in time now, but between the time you came to work and the time you went to lunch, were you a member of the Addison Miller crew that iced a fruit train?

A. I was a member of the Addison Miller crew, but I don't remember icing any train.

Q. Well, when I say "train," I mean the 55 refrigerator cars, if I don't make myself clear. But you did work during that period of time icing cars, didn't you?

A. I probably—I can't say it is true, but I probably did.

Q. Yes. And isn't it true, Mr. Davis, that you finished that work about 6:10 p.m. on that day?

A. I don't know.

(Testimony of Ray Davis.)

Q. And were you there, Mr. Davis, when the fruit train was pulled off of Track 12 and Track 13, hooked together and left the yards for the East at approximately 7 p.m.?

A. No.

Q. You weren't there?

A. No. If I was there, I didn't see the trains leave.

Q. Well, now, when you went to lunch, Mr. Davis, the fruit train, the refrigerator cars, was that still sitting on [362] Tracks 12 and 13?

A. I never noticed.

Q. Were there any cars on Tracks 12 and 13 when you went to lunch?

A. I never noticed it.

Q. Now during this five days before July 17, '52, had you unloaded salt at any time between that time while you were working there in 1952?

A. I can't hear you.

Q. Pardon, sir?

A. I can't hear you.

Q. All right. Mr. Davis, you have told us you worked for five days at the Addison Miller plant before this accident occurred; that is correct, isn't it?

A. Yes.

Q. And during those five days, did you at any time unload salt from a boxcar to the salt pit?

A. I can't remember that. I can remember the same day Gerry got hurt I unloaded salt that day.

Q. Well, what time of the day was it when you unloaded salt on July 17, 1952?

A. I don't know.

(Testimony of Ray Davis.)

Q. What was your answer, please?

A. I don't know.

Q. Well, did you unload salt immediately after you came on [363] shift, do you remember that?

A. No.

Q. In other words, you don't know what time it was during the period after 3 p.m. when you came to work on July 17, 1952 that it was when you unloaded salt? A. No.

Q. You don't? A. I don't know.

Q. You don't know. Well, now, Mr. Davis, do you recall unloading any salt on July 16, 1952, the day before? A. No.

Q. Did you know that on July 16, 1952, that a car of salt, a Great Northern car, was unloaded on Track 13 on July 16, 1952? Did you know that?

A. No, I didn't know that.

Q. And did you know that that operation was completed in the afternoon of July 16, 1952?

A. No, I didn't know that.

Q. I see. At any time, Mr. Davis, before July 17, 1952, had you seen any salt car being unloaded at the salt house there?

A. I can't remember.

Q. Well, now, you do remember, Mr. Davis, of going to lunch on July 17, 1952; you remember that, don't you, sir? [364]

A. Yes, I remember it.

Q. And in doing that, you left the dock, went through the tunnel and went over to the ice manufacturing plant, is that right?

(Testimony of Ray Davis.)

A. You mean after I came back from lunch?

Q. No, Mr. Davis, when you went to lunch, is that what you did? A. Yes.

Q. And you don't know, then, at that time, just when you left the dock and went over to go to lunch, you don't know whether there were any cars on Tracks 12 or 13 at that time? A. No.

Q. How long did you stay over at lunch, about an hour or so?

A. I would say about an hour.

Q. And when you came back over to the ice dock after eating your lunch, the foreman, Mr. Fincher, was with you at that time, wasn't he?

A. You mean after we got back on the dock?

Q. No, as you were coming through the tunnel and going back to the dock?

A. I don't know.

Q. Well, if you can remember, Mr. Davis, where was Mr. Fincher, the Addison Miller foreman, when you first saw [365] him after having your lunch?

A. It is when he gave the instructions to some of them to work in the pit and for some of them to go carry ice.

Q. And was he up on top of the dock at that time? A. When he gave the instructions?

Q. Yes, sir? A. Yes.

Q. And was he standing right near the salt gig at that time? Do you know where the elevator that brings the salt up from the pit up to the top of the dock is? Do you know where that is?

A. Yes.

(Testimony of Ray Davis.)

Q. And that is where he was standing, was it, in that area? A. In that area, yes.

Q. Yes. Then you say he gave instructions then for some of the boys to go down and carry out slush ice, is that right? A. Yes.

Q. And what instruction did he give you at that time?

A. He didn't just give me no definite instruction, he just said, "Two or three of you guys go downstairs and work in the salt pit and two or three of you guys go the other way."

Q. He told you at that time, Mr. Davis, for two or three of you to go down and work in the salt pit, is that [366] right? A. Yes.

Q. And the work that you were going to do in the salt pit was load sacks of salt on the elevator that was going to take them up to to the top of the dock, isn't that right?

A. No. When you work in the salt pit, that includes unloading the boxcar and from the boxcar to the salt pit, from the salt pit upstairs on the dock.

Q. Well, now, who were the other two or three men that you were with?

A. Well, the only guys I can remember was—I am the only guy I remember was down there at the time.

Q. There was one other by the name of George Stahl that was down in the salt pit, wasn't there?

A. I don't remember.

(Testimony of Ray Davis.)

Q. Well, in any event, you say there was two of you were there?

A. Well, when I meant two of us, I meant just the guys I knew was there.

Q. Well, how many of you altogether were there down in the salt pit?

A. I don't know.

Q. Was there more than two?

A. Yes. [367]

Q. Was there three? A. Could have been.

Q. Well, can you give me your best recollection of how many were working down in the salt pit?

A. I couldn't give you none.

Q. You couldn't say?

A. I couldn't say.

Q. How did you get down to the salt pit?

A. I walked down some stairs.

Q. And how did you get into the salt pit?

A. From the stairs.

Q. Do the stairs go right into the salt pit itself?

A. I can't remember that, but I know you start from the stairs and you get there some way.

Q. Well, now, when you got down there, was there a salt car on the track? A. Yes.

Q. Who opened the door of the salt car?

A. I don't remember.

Q. Did you see anybody open the door?

A. No.

Q. Who put up the platform?

A. I don't know.

(Testimony of Ray Davis.)

Q. Did you see anybody put up the platform?

A. I did not. [368]

Q. When you got down there, was the platform already up? A. Yes.

Q. Was the door of the boxcar open?

A. Yes.

Q. Can you tell me anything about that boxcar, what color it was, or anything about it?

A. Just looked like an ordinary boxcar to me.

Q. Do you remember what color it was?

A. No.

Q. Now to the west of that boxcar, Mr. Davis, having in mind to the west, what kind of a car was next to it? A. I don't know.

Q. Was it a cattle car?

A. I don't know what a cattle car is from a fruit car.

Q. Well, you know the kind of cars that they ship cattle in that have siding on them, probably four to six inches, then space between so they get air; you have seen those, haven't you?

A. Yes, I have seen them around.

Q. Well, did you see one of those cars next to the cattle car? A. I didn't notice.

Q. Or to the salt car, excuse me. Well, now, what did you do as soon as you got down to the salt pit?

A. I started taking salt over to the elevator and sending [369] it up, and then later I worked in the boxcar unloading it from the boxcar, just vice versa.

(Testimony of Ray Davis.)

Q. What did you use to unload it from the boxcar?

A. One of those little deals with the two wheels under it. I don't know what you call it. And some carried it, too.

Q. Did you carry some of them? A. Yes.

Q. How big are those sacks?

A. I would say they weigh at least 80 pounds.

Q. And how long did you do that before this accident happened? A. I couldn't say.

Q. At that time, Mr. Davis, where was Foreman Fincher? A. I don't know.

Q. Wasn't he on top of the dock running the salt gig, the machine that brings the salt up to the top of the dock, right above you?

A. Well, that is where I left him, up on the dock, but what he was doing I don't know.

Q. Well, do you know who stayed up there to run the salt gig? A. No.

Q. How many trips did you make from the boxcar to the salt pit? [370]

A. I can't remember.

Q. How many sacks did you take from the boxcar, approximately, to the salt house?

A. I couldn't give you no definite number, but it was quite a few.

Q. And then you say that you quit doing that, is that right; before the accident happened, you quit unloading salt?

A. Well, we took a 10 minute break, if that is what you mean.

(Testimony of Ray Davis.)

Q. And you say you took a 10 minute break?

A. Yes.

Q. And where did you go when you did that?

A. I went out there and stood in between the boxcar and the salt pit.

Q. You mean you stood between Track 13, or the track north of the ice dock, and the ice dock itself?

A. Yes.

Q. Did you stand there alone?

A. I can't remember.

Q. Was anybody with you?

A. Yes, everybody was working down there in the pit, but I am the only one that was standing out there, that I can remember, anyway.

Q. Now when you were standing there, did you see Gerald [371] Stintzi and Allan Maine?

A. No, I didn't even know where they was.

Q. You didn't see them at any time?

A. No.

Q. Did you see them come out of the doorway with a bucket of slush ice at any time?

A. No, I didn't.

Q. Never ever saw them?

A. I never saw them.

Q. And how long did you stand there?

A. About—I would say about three to five minutes.

Q. Three to five minutes? A. Yes.

Q. Or longer, possibly like 10 minutes, that you mentioned before? A. No.

Q. Well, now, when you were taking salt out of

(Testimony of Ray Davis.)

the boxcar there, putting it in the salt pit, did you see Gerald Stintzi or Allan Maine at any time?

A. No, I did not.

Q. Did you see anyone else taking slush ice out of the doorway there and carrying a bucket?

A. I did not.

Q. This platform that you mentioned here from the salt pit, the salt house, to the boxcar, how high was that from [372] the ground?

A. I don't know.

Q. Well, you were standing close to that, were you, when this accident happened?

A. I believe I was.

Q. Well, would it be approximately 45 inches from the ground? A. I don't know.

Q. Well, would it be as high as the rail in front of the jury here, Mr. Davis? Would it be that high?

A. I still couldn't say.

Q. I see. How wide was the platform?

A. I don't know.

Q. Pardon? A. I don't know.

Q. Do you know how long it was?

A. No, I don't.

Q. Well, now, were there any cars, any freight cars of any kind, east of the car you say you were unloading salt from?

A. What do you mean when you say "east?"

Q. East. Well, do you know the directions out there? A. No.

Q. Well, how many cars were on either end of the salt car that you have talked about? [373]

(Testimony of Ray Davis.)

A. I don't know, but it was quite a few cars there, but the number I don't know.

Q. In both directions?

A. Yes, I would say in both directions.

Q. In both directions?

A. In both directions.

Q. You don't know what kind of cars?

A. I don't know.

Q. And this salt car was right in the middle of this string of cars, is that right?

A. That's right.

Q. And was this salt car hooked to the car on the east and to the car on the west? Was it coupled together with those other cars?

A. I never noticed.

Q. Mr. Davis, do you remember talking with Mr. Thomsen, the Northern Pacific claim agent, on Wednesday, June 9th, at about 4 p.m. on the front porch of your home at 3511 East Garnet?

A. Yes.

Mr. MacGillivray: What year?

Mr. Cashatt: Of this year, 1954.

A. Yes.

Q. And at that time, Mr. Davis, didn't you tell Mr. Thomsen, "I was working in the salt mine?"

A. Yes.

Q. And didn't Mr. Thomsen ask you what you meant by the "salt mine?"

A. I think so.

Q. And didn't you tell Mr. Thomsen that you meant the salt house, the salt pit?

(Testimony of Ray Davis.)

A. That is what I was referring to, yes.

Q. And at that time, Mr. Davis, didn't you tell Mr. Thomsen that on that evening of July 17, 1952, that you had not unloaded any salt from a salt car?

A. No, I can't remember that.

Q. You can't remember that? A. No.

Q. Can you remember telling him that?

A. Telling him that?

Q. Yes, sir? A. No.

Q. Can you remember telling him that no salt car was being unloaded that night?

A. I can't remember that, either.

Q. Do you remember talking about salt cars, and so on, with Mr. Thomsen that evening?

A. I can remember using the word "salt" and the "pit."

Q. And you could remember using the word "mine?" A. Yes. [375]

Q. Would you say that you didn't make those statements, those last two statements, to Mr. Thomsen?

A. I did not, not remembering it, anyway.

Q. Pardon?

A. Not remembering it, anyway.

Q. What do you mean not remembering it?

A. What I mean, I mean if I said it, I don't remember it.

Q. Well, then, do you mean by that that there is a possibility that you did make those statements?

A. That's right.

Q. On Wednesday, June 9, 1954, at about 4 o'clock

(Testimony of Ray Davis.)

on the front porch of your home, is that right?

A. That is a possibility I did not say it, either. There is a possibility I did not say it, either.

Q. And there is also a possibility, isn't there, that you did make those statements?

Mr. MacGillivray: Just a minute. Mr. Cashatt, is this for the purpose of impeachment? Are you intending to call Mr. Thomsen?

Mr. Cashatt: That's right.

Mr. MacGillivray: Go ahead.

The Court: All right, go ahead.

Mr. Cashatt: That is all.

Excuse me, Mr. MacGillivray.

The Court: All right. [376]

Mr. Cashatt: I have one more question.

Q. Mr. Davis, I believe counsel asked you if the lights were on on the dock. Were the lights on on the ice dock at the time you were working where you have told us on that evening?

A. Well, I never noticed the lights until I came back up on the dock after the accident.

Q. After the accident? A. Yes.

Q. And, well, which lights were on?

A. The white ones.

Q. And which string of white lights, the string on the south side of the dock or the string on the north side of the dock? Which ones?

A. Just like I said, I don't know my directions out there.

Q. Well, take both sides of the dock, whether you know whether it was the south side or the north

(Testimony of Ray Davis.)

side, were the lights on on both sides of the dock?

A. I can't remember that. Just where I came up from the stairway, that is where the lights was on.

Q. And at that time, there was no work going on to the far east end of the dock, was there?

A. I can't remember. Everybody was so excited by the accident, they was all standing around.

Q. Well, then, it is your testimony that there were some [377] lights on, but you don't know which ones were on?

A. Yes, I know the white lights was on, yes.

Q. But were the white lights on both sides of the dock on when you came up there?

A. I can't remember. I remember seeing lights, but I don't know how many it was and I don't know where they was, except coming out of the stairway, that is where I seen them, or that is where I saw them.

Q. You saw some lights, but you don't know which ones or how many?

A. I know which ones I saw, the white ones, yes.

Q. But you don't know if they were the ones on the south side of the dock or the ones on the north side of the dock?

A. That's right.

Q. And you don't know if the ones past the house in the center of the dock were on or not, the ones farther to the east?

A. I do not.

Q. Did you know that the Addison Miller foreman was supposed to put up a blue light at the west end of the dock when there was any work going on on or about cars at night there?

A. No.

(Testimony of Ray Davis.)

Q. You didn't know anything about that? [378]

A. No.

Q. And you didn't see any blue light on at the west end of the dock at any time that evening?

A. No. Well, I had seen blue lights just looking around, you know, just pass by and you see a light and notice it, sure. I had seen them, but what they meant I didn't know.

Q. You didn't know what they were?

A. No.

Q. But you didn't see any at the west end of the dock that evening? A. No.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Ray, immediately after the accident, you said you got awful scared and ran into the salt pit? A. Yes.

Q. Did you immediately go upstairs to the top of the dock?

A. No, not until Allan Maine came down to the salt pit.

Q. How soon did you get up to the top of the dock?

A. As soon as he came down and said Gerald was injured.

Q. And when you got up to the top of the dock, was the platform on the top side well lit up? [379]

A. Yes.

Q. On the west end?

A. Like I say, I didn't know my directions.

(Testimony of Ray Davis.)

Q. Well, on the end where you came up the stairs? A. Yes.

Q. Then, Ray, have you been out there since, outo that dock since this accident happened?

A. No.

Q. Counsel asked you about the height of this platform that you rolled the little car, 2-wheel car, over from the salt car to the salt pit; do you recall that? A. Yes.

Q. He asked you how high, you don't know how high it was? A. No, I don't.

Q. You do recall, Ray, that that platform ran from the floor of the railroad car to the floor of the salt pit? A. Yes.

Q. And however high that is, that is how high the platform was? A. Yes.

Q. And about the width of the platform, the platform was wide enough so this 2-wheel cart could be wheeled back and forth on the platform?

The Court: I think you should let the witness testify, Mr. MacGillivray; you have been testifying on this [380] redirect.

Mr. MacGillivray: I'm sorry, your Honor.

Q. Was the platform wide enough to wheel this 2-wheel cart back and forth? A. Yes.

Q. Do you know how many feet it was in width?

A. I don't, no.

Q. After Fincher gave you your instructions up on top of the dock to go down and work in the salt pit, did you again see Fincher before Gerry was hurt? A. No, I didn't see him again.

(Testimony of Ray Davis.)

Q. And you told Mr. Cashatt that you didn't remember just what time it was that you unloaded salt. By that you mean you don't know what hour it was?

A. No, I don't know what time it was.

Q. Well, do you recall whether or not you unloaded salt between the time that you returned from dinner and the time that Gerry was injured?

Mr. McKevitt: This is cross-examination of his own witness, we object on that ground.

Mr. MacGillivray: Where that is cross-examination, I don't know.

The Court: Well, I think you can ask him the time as nearly as he remembers.

Q. (By Mr. MacGillivray): Well, with reference, Ray, to the [381] time that you returned from dinner and the time that Gerry was injured, had you unloaded any salt? A. Yes.

Q. Now Mr. Thomsen, the railroad claim agent, was out to see you at your house on June the 9th?

A. It was in June, yes.

Q. It was in June. What time of day was he out there, Ray?

A. Oh, I would say about 10, 12, I don't know.

Q. In the morning, you mean?

A. Yes.

Q. And how long did he stay there and talk with you? A. About 5, 10 minutes.

Q. And he asked you questions and you answered? A. Yes.

(Testimony of Ray Davis.)

Q. And did he write out what you told him on a tablet or anything?

A. I can't remember.

Q. Well, did he ask you to sign any statement?

A. No.

Q. And did you sign any statement?

A. No.

Mr. MacGillivray: That is all. [382]

Recross Examination

Q. (By Mr. Cashatt): Mr. Davis, then it is your testimony that you did unload salt on July 17, 1952, but you don't know what time you did it, is that right?

A. That's right.

Mr. Cashatt: That is all.

Mr. MacGillivray: That is all.

The Court: That is all, then. Call the next witness.

(Witness excused.)

Mr. Etter: Mr. Lee.

MELVIN E. LEE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is Melvin Lee?

A. Yes, sir.

Q. Where do you live, Mr. Lee?

A. 7228 East Fourth.

Q. 7228 East Fourth?

A. Yes, sir.

(Testimony of Melvin E. Lee.)

Q. That is out in the Valley? [383]

A. Yes, sir.

Q. Are you married? A. No, sir.

Q. How long have you lived at that address, Mr. Lee? A. 24 years.

Q. What is your present occupation?

A. Roofer.

Q. You are a roofer? A. Yes.

Q. Who do you work for?

A. Spokane Roofing.

Q. Spokane Roofing. How old are you, Mr. Lee?

A. 23.

The Court: 23?

Mr. Etter: 23.

The Court: I thought he said he had lived at this address for 24 years.

A. Well, it is so close.

The Court: I see, all right. Well, that is all right. The family lived there before you were born?

A. Yes, quite some time.

The Court: Go ahead.

Q. (By Mr. Etter): Reverse gear, probably, Melvin. Melvin, were you employed by Addison Miller just prior to July 17th of 1952? [384]

A. Yes, sir.

Q. And when had you gone to work, if you recall, if you remember the date, for Addison Miller in 1952? A. Gosh, I don't know.

Q. Had you been working there prior to the 17th? A. Oh, yes, for some time.

(Testimony of Melvin E. Lee.)

Q. For some time. It had been a couple of weeks or three weeks, or do you have any recollection?

A. Something like that.

Q. I see. Now what were your duties during that time, what work did you perform during the time that you worked for Addison Miller prior to the 17th of July, Melvin?

A. Well, I done just a little bit of everything.

Q. Meaning what, now, briefly, to the jury?

A. Well, we iced cars, we unloaded salt, we moved ice, transported salt on top of the dock, different things, just general routine.

Q. I see. Much in the fashion that some of the witnesses have testified to here?

A. Yes.

Q. Now do you recognize Gerry Stintzi here in the courtroom?

A. Yes, sir, I do.

Q. And Allan Maine? [385]

A. Yes, sir.

Q. And Joe Vallarano, did you recognize him?

A. Yes, sir.

Q. Now on the 17th of July, what shift were you working?

A. Swing.

Q. The swing shift?

A. Yes, sir.

Q. What do you mean by the swing shift?

A. Well, from 3 to 11.

Q. Had you worked the other shifts during the time that you were employed there?

A. Well, I had worked mostly days and swing.

Q. Mostly days and swing. That would be the 7 to 3 shift, the day shift; the 3 to 11, the swing?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

(Testimony of Melvin E. Lee.)

Q. All right. On the 17th, you were on the swing shift? A. Yes, sir.

Q. You went to work at what time?

A. 3 o'clock.

Q. 3 o'clock. What work did you do immediately upon reporting for work at 3 o'clock on July 17th, Melvin? A. I don't remember.

Q. You do not remember? [386]

A. No, sir.

Q. Would you say it was just the general work that you have described? A. Yes, sir.

Q. I see. All right, do you recall about what time it was that you had supper that night or lunch, whatever it might have been?

A. Not—well, to the best of my knowledge, it was about 7.

Q. It was about 7? A. Yes, sir.

Q. Do you recall whether you had your lunch with someone, some of the other fellows that were working, or did you have it alone? A. Yes.

Q. Do you recall who they were?

A. Well, there was two of them. One of them I don't know, I never did know his last name.

Q. I see, you don't recall?

A. And this one fellow I worked with him, this one guy, I worked with him all the time.

Q. You worked with him all the time?

A. Kind of a chum of mine more or less.

Q. Do you remember his name?

A. James Jerome. [387]

Q. And you had lunch with him, that you recall,

(Testimony of Melvin E. Lee.)

and one unnamed or one unknown to you at this time? A. That's right.

Q. Or un-remembered, what it might be. After you had lunch, Melvin, what work did you do, do you recall?

A. Well, I went home. I was going to put in an extra shift that night, they were short.

Q. I see.

A. So I went home after lunch.

Q. You went home after lunch?

A. Yes, sir.

Q. When did you come back?

A. Well, it was sometime after 8.

Q. I see. You say you were going to work an extra shift that night? A. Yes, sir.

Q. In other words, you were going to work your swing shift and then the shift from 11 around to 7?

A. Yes, sir.

Q. 16 hours? A. Yes, sir.

Q. What was your purpose in going home right after you had lunch?

A. Well, I went home after lunch so I could have something to eat in the morning. [388]

Q. Get another one and bring it back, was that the idea? A. Yes, sir.

Q. And you got back to your place of employment, do you recall about what time it was, that is, after you had gone home?

A. It must have been right close to 8:30, some time.

Q. Was it before the accident? A. Yes.

(Testimony of Melvin E. Lee.)

Q. I see. Now did you see the accident?

A. No, sir.

Q. You did not. When did you first hear or know anything about that?

A. Well, I met this Joe Vallarano in the tunnel, is the first I knew of it.

Q. You were proceeding in the tunnel from the outside, that is, the ice manufacturing establishment, on in under the tracks?

A. Yes, from the plant to the dock.

Q. I see. Was it on your way back from home?

A. Yes, sir.

Q. You were going north, then, were you not, in the tunnel? A. Yes, sir.

Q. You met Joe Vallarano coming the other way? A. Yes, sir. [389]

Q. That is when you first learned, I gather, about this accident? A. Uh-huh.

Q. All right, what did you do then?

A. Well, we was curious, naturally, as to just what happened, and he didn't give us any names, he just said that somebody had got hurt over there.

Q. Yes?

A. And then he didn't stop or anything, he just went on his way, and we went on ourself.

Q. I see. Where did you go?

A. We went up to the ice dock and then over the top of the car and down the other side.

Q. Down the other side? A. Yes, sir.

Q. And you saw Gerry Stintzi there?

A. Yes, sir, we did.

(Testimony of Melvin E. Lee.)

Q. You testified you didn't see the accident?

A. No, sir.

Q. All right. Do you recall what happened after you got down inside the car?

A. Well, he was laying there kicking and kind of screaming and moaning and trying—well, he was trying to get it across to us to get ahold of his mother, and we couldn't quite make out what he was saying. We was trying to [390] hold him still so he didn't do too darn much tearing around.

Q. I see. And later on he was removed?

A. Yes, sir.

Q. You were there, were you, at that time?

A. I was there from the time I got there until they took him away.

Q. All right. Will you tell me, Melvin, did you notice, before you left to go home or before you left to go to lunch at about 7 o'clock, whether there was a string of cars along Track 13 to the north of the dock?

A. I don't remember for sure.

Q. You do not remember. Do you remember when you came back, you recall that there was a string of cars there when you saw young Stintzi?

A. Yes, sir, there was then.

Q. But you don't know beforehand?

A. No.

Q. All right. Did you notice whether or not the dock, that is, the upper part of the dock running from east to west, did you notice whether or not that was lighted when you got back?

(Testimony of Melvin E. Lee.)

A. It seems to me it was.

Q. Seems to you it was. I will ask you, did you notice how many cars there were in the string when you went [391] over the cars to see what you could do for young Stintzi?

A. No, I never, I was just interested in getting over there, that was it.

Q. I see. Now did you notice, while you were working there or during the time that you had been working there, any blue lights on the dock?

A. Yes, sir.

Q. Did anybody from Addison Miller or the Northern Pacific Railroad ever tell you anything about blue lights?

A. Not to my knowledge.

Q. Not to your knowledge. Foreman Fincher was the man who was running the job that night, running that shift?

A. Yes, sir.

Q. Had he ever told you?

A. Never mentioned it to me.

Q. Never mentioned it to you at all. During the time that you were working there, whatever time it was, the number of weeks that you were working there, had you ever seen cars switched in on either Tracks 12 or 13, that is, the track south and the track north of the icing dock, when cars were already spotted there?

A. Well, not free.

Q. Not free? A. No. [392]

Q. You never had?

A. No, sir, I had never seen that done.

Q. You had never seen that done. Mr. Lee, did

(Testimony of Melvin E. Lee.)

you know what the purpose of the blue lights was?

A. Yes, sir, I do.

Q. Beg your pardon?

A. Yes, sir, I do.

Q. What purpose—

Mr. Cashatt: Just a minute, Mr. Etter, please. I think it should be confined at this time of the accident, instead of a general question.

The Court: I think he can testify as to what the purpose was, if he knows. He is not testifying now as to whether they were on or off at any particular time; isn't that your question?

Mr. Etter: Yes, I was going to ask him what the purpose of the blue lights is, if you know, and how you got that information. That's all.

A. Well, I took switchman training for the G.N.

Q. All right.

A. And they specified strictly to us that any car, either by flag or by lamp, regardless of being daylight or night, flag by day and light by night, that those cars at any time are not to be touched until that light was removed by the man that put them there. [393]

Q. I see. And those were your instructions, is that correct?

A. Yes, sir, they were.

Q. But you had never been told anything by Fincher?

A. No, sir.

Q. And on this night in question, you don't know whether the lights were on or whether they were off?

(Testimony of Melvin E. Lee.)

Mr. McKevitt: Are you speaking about the blue lights?

Mr. Etter: Yes, sir, that is correct.

A. I remember the one wasn't on when we came back up.

Q. It was not. You don't know what the situation was at the time of the accident?

A. No, no, I do not.

Q. I see. Had you seen during the time you were working there, had you seen the blue lights on at various times? A. Yes, sir.

Q. You had. Had you also seen them off, of course? A. Yes, as I remember.

Q. But whether the lights were on or off, had you ever seen cars drifted in or kicked in to either 12 or 13, whether the blue lights were on or off?

A. No, sir.

Mr. Cashatt: I object to the form of the question. [394] There are two questions combined in one there.

Mr. Etter: I will reframe the question.

The Court: Do you wish to reframe it?

Mr. Etter: Surely.

Q. Did you ever see any cars drifted or kicked, cars that were already on Tracks 12 and 13, when the blue lights were on during the time you worked there? A. No, sir.

Q. Did you ever see them kicked in or drifted in when the blue lights were off during the time you were working there?

A. Not to my knowledge.

(Testimony of Melvin E. Lee.)

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. Cashatt): Mr. Lee, how long did you say that you had worked for Addison Miller before this accident occurred?

A. I don't remember.

Q. Did you start in 1954—excuse me.

The Court: About two weeks, I think he said, didn't you?

A. Thereabouts.

The Court: About two weeks.

A. I don't know just how long. [395]

Q. (By Mr. Cashatt): About two weeks. Had you worked there at any time before 1952?

A. No, sir.

Q. Now during that two week period, Mr. Lee, isn't it a fact that you understood that the blue lights were to be put up by the Addison Miller foreman when any work was going on on or about cars on the track?

A. No, sir.

Q. You didn't know that?

A. I did not have that understanding at all.

Q. And that night after you came back to the dock, you learned that there was no blue light on at the time this accident occurred on Track 13?

A. That was hearsay.

Mr. MacGillivray: Object to that as calling for hearsay.

The Court: You are to answer that as of your own knowledge, of course.

(Testimony of Melvin E. Lee.)

A. As far as I know, it was just hearsay, it was just the talk, just what I was told.

The Court: You shouldn't answer on hearsay.

Q. (By Mr. Cashatt): From what you learned, Mr. Lee, from working with the Great Northern, and so on, you knew that the blue lights were put up to warn switchmen so that no cars would be moved against a car protected by [396] the blue light; you learned that, didn't you?

A. Yes, sir, that's right.

Q. And you had never seen any Northern Pacific switchmen move cars in on Tracks 12 or 13 when the blue lights were on, had you?

A. Not to my knowledge.

Q. You never had seen it, had you?

A. I never seen it anywhere.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. Etter): From your training for the Great Northern, Mr. Lee, did you have any other instructions with regard—or learn anything else about the moving or switching of cars into standing cars other than the protection afforded by the blue light?

Mr. Cashatt: I object to that.

Mr. Etter: He went into it.

Mr. Cashatt: These other factors would not be material in any way to the relationship of Addison Miller and Northern Pacific in this case.

Mr. Etter: Well, counsel, you inquired about his

(Testimony of Melvin E. Lee.)

training as a switchman and what the blue lights meant. I think I have a right to inquire what else he learned about [397] lights.

The Court: I think the door has been opened.

Mr. McKevitt: If your Honor please, I think Mr. Cashatt's examination was proper under the direct examination of Mr. Etter, who opened up the blue light question.

The Court: I will sustain the objection.

Q. (By Mr. Etter): Did you continue to work for Addison Miller after the 17th?

A. I just put in that late shift that night, was all.

Q. Put in the late shift? A. Yes, sir.

Q. How many were on that crew, do you recall? How many were in that crew?

A. You mean on the graveyard shift that night?

Q. Yes? A. Not very many.

Q. On the swing shift, I am talking about?

A. Oh, there must have been 25 or 30 men there, about the same complement as usual.

Q. I see. Do you know how many of those men returned to work the following day?

A. No, sir, I don't.

Mr. Etter: That is all.

The Court: Any other questions?

Mr. Cashatt: No questions. [398]

The Court: That is all, then.

(Witness excused.)

Mr. MacGillivray: Mr. Libby, please.

CHARLES LIBBY, JR.

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your name is Charles Libby? A. Jr., that's right.

Q. And your occupation?

A. Photographer.

Q. And your place of business is where?

A. 218 South Lincoln.

Q. Mr. Libby, sometime one night last week, did you go out with Mr. Etter and myself and take some pictures at the Yardley or Parkwater yards of the Northern Pacific Railway?

A. Yes, sir, I did.

Q. What date was that?

A. The night of the 23rd, I believe.

Q. And about what time was it you started taking those pictures?

A. We started taking the pictures about 8:45.

Q. And we stayed out there until about when, do you recall?

A. Around 10:30, 11 o'clock.

Q. And do you recall how many shots you actually took?

A. I believe I made five black and white and two color shots, if I am not mistaken.

Q. Did the color shots turn out?

A. Beg your pardon?

Q. Did the color shots turn out?

A. Yes, sir.

(Testimony of Charles Libby, Jr.)

Q. I mean, did you develop the color shots?

A. Yes, sir.

The Clerk: I have marked Plaintiff's 20 and 21 for identification, your Honor.

Q. (By Mr. MacGillivray): Handing you what is marked as Plaintiff's Exhibit 20, I will ask you what that is, what it shows, and from where that picture was taken?

Mr. Cashatt: I object to any testimony off the picture, your Honor, until after it is identified and admitted.

Mr. MacGillivray: Pardon?

Mr. Cashatt: I object to any testimony off the exhibit until it is identified and admitted.

The Court: As I understand it, this is just to show what it is?

Mr. MacGillivray: To identify it. [400]

The Court: To lay the foundation for its admission as to its relevancy.

Q. (By Mr. MacGillivray): Well, first, at what time was this picture taken, do you know?

A. I would say around 9 o'clock or maybe shortly after.

Q. And the picture was taken from what position in the Yardley yards?

A. About Switch 13, I believe they call it, looking east.

Q. Looking east toward the icing dock?

A. That is correct.

Q. And at the time the picture was taken, were

(Testimony of Charles Libby, Jr.)

the white lights on the top of the icing dock illuminated? A. They were.

Q. Now is that a colored shot?

A. That is black and white.

Q. That is black and white?

A. That is correct.

Q. And does that picture, looking east, show the icing dock and white lights on the top of the icing dock? A. It does.

Q. Now handing you what is marked at Plaintiff's Exhibit 21, that is a picture taken at the Yardley yards on the 23rd of this month?

A. That is correct.

Q. At about what time was that one taken? [401]

A. I believe that one was taken about 9:30.

Q. And from what position?

A. This was taken from about Switch 13, a little bit to the side, as I recall.

Q. Which side, south or north?

A. Slightly north.

Q. And that is looking in what direction?

A. That is looking east.

Q. And does that picture show the icing dock, as you knew it, with the white lights illuminated on top of the icing dock? A. That is correct.

Mr. MacGillivray: Ask the admission.

The Court: Have you shown them to counsel?

Mr. MacGillivray: He has seen copies.

Q. This last one, is that a colored one?

A. No, that is black and white.

(Testimony of Charles Libby, Jr.)

Q. Mr. Libby, these pictures were delivered to my office? A. That is correct.

Q. Did you deliver any colored ones?

A. I did.

Q. Are you sure of that?

A. They were in the same envelope with the black and whites.

Q. Do you have copies at your place of business? [402]

A. No. On color, color shots, we process the negative to a reversal for a positive and you only have the one.

The Court: So far, there hasn't been any indication in the testimony, so far as I recall, as to where these switches are. I am not passing on the admissibility of the photographs, but I think it would make a better record if you could point that out. Of course, this witness couldn't do it, but if you can agree as to where he is talking about when he says Switch 12 and 13, was it?

The Witness: No——

Mr. MacGillivray: Your Honor, to save a little time, the next witness will point out on the exhibit just where Switch 13 is.

The Court: I see, all right.

I will excuse the jury for the morning recess here.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: All right, do you have an objection to these photographs?

(Testimony of Charles Libby, Jr.)

Mr. Cashatt: Yes, I do, your Honor, and I would like to see all of the pictures taken that evening before passing on these, if I may.

The Court: Well, they haven't got the colored ones [403] here, apparently.

Mr. Cashatt: Well, your Honor, I object to Exhibit No. 20 and Exhibit No. 21, that they were taken in 1954, that they were taken at a different time of day, after the time which has been established in the case that this accident occurred. I believe the closest we have is about 8:20 p.m., and the evidence here is these were taken about 8:45; that it would not represent a true and correct view of what any switchman or anybody else had of this location at the time these cars were switched or anything like that, and that would serve no useful purpose at all as far as——

The Court: You may be excused, if you wish, you boys, but just go quietly, we are not recessed.

Mr. Cashatt: There is no showing in the case; the evidence here, that all of the dock lights were on, and at the time these pictures were taken there is no evidence in this case that all of the dock lights were on at the time. There is some evidence that some lights were on.

Now this dock, as the evidence shows, is 300 feet long. There is no evidence as to which of those dock lights were on at the time, and here the evidence is that they are all on at the time these pictures were taken; and, further, that the pictures

(Testimony of Charles Libby, Jr.)

were taken at a different day of the year. What date was that, Mr. Libby, please?

The Witness: I believe it was the 23rd. [404]

The Court: Of June?

The Witness: Yes, sir.

Mr. Cashatt: Of June, 1954?

The Witness: 1954, yes, sir.

Mr. Cashatt: And we would have that time of the year between June 23rd and July 17th as to the length of time——

Mr. Etter: It is earlier.

The Court: It would get dark earlier the 17th of July than the 23rd of June.

Mr. Etter: It is about a minute a day.

The Court: Is that so?

Mr. MacGillivray: Yes.

Mr. Etter: Mr. Libby can qualify those.

Mr. Cashatt: Further, no showing of the time of day that these were taken on, anything like that, that would make it similar to the situation that we had on July 17, 1952.

Mr. MacGillivray: Well, as to the time, 8:45 as compared to 8:45, Mr. Cashatt. I think your Honor can take judicial notice of the fact that it becomes lighter from June 22nd on.

The Court: I think one witness testified that it was very close to 8:30; that he was in the tunnel about 8:30 and met this young man running in the opposite [405] direction.

Mr. MacGillivray: That's right.

(Testimony of Charles Libby, Jr.)

The Court: To run to call for the ambulance, and he said that was 8:30, as I recall.

Mr. MacGillivray: I think all of the evidence will show that the accident happened sometimes between 8:20 and 8:30.

The Court: What were the differences in hour of darkness between the 17th of July and the 23rd of June?

Mr. MacGillivray: Well, as I understand——

Mr. Etter: About a minute per day.

Mr. MacGillivray: ——about a minute per day.

The Witness: Well, it runs a little more than a minute per day. It won't average a minute and a half, but it will run a little over a minute.

Mr. Cashatt: One further thing, your Honor, that there is undoubtedly a train coming from the east.

The Court: May I see the picture?

Mr. Cashatt: Approaching the west, which throws light. There is no showing that that condition ever existed at the time this accident occurred.

(Exhibits handed to Court.)

The Court: Is that supposed to show the two sides of the loading dock?

Mr. MacGillivray: No, your Honor. I might point [406] out to you, here is the loading dock, this oblong (indicating).

The Court: Oh, I see. Then the train headlights are off here?

Mr. Cashatt: The ones I was referring to, your Honor, are here (indicating).

(Testimony of Charles Libby, Jr.)

The Court: Oh, that?

Mr. MacGillivray: Well, the witness can explain that, can point out to the jury, if we get it in evidence, just what these other lights were.

Mr. Cashatt: Then it might be a question, your Honor, as to what effect that would have on what anybody saw at the time this accident occurred, and so on.

Mr. MacGillivray: Unfortunately, we couldn't get Northern Pacific to turn off all their lights except the dock lights.

Mr. McKevitt: We did everything else but cease operating a railroad when you were out there on two different occasions.

Mr. MacGillivray: Mr. Cashatt was there with us, also.

The Court: I think, generally, courts allow considerable latitude in the matter of taking illustrative photographs, and, as a matter of fact, it is the usual thing, rather than the extraordinary, that pictures of a [407] scene of an accident are taken long after the accident occurred, but usually litigants are not as prompt as railway claim agents seem to be sometimes in the matter of getting the evidence. I don't say that in a derogatory way; that is their job and they do a good job.

Mr. McKevitt: No, they are supposed to.

The Court: Supposed to. Here, of course, this is a little extraordinary situation.

I think that the photographs should be admitted, with, of course, the privilege of cross examination

(Testimony of Charles Libby, Jr.)

or rebuttal testimony to show the differences and to detract from their value as much as you are able to do.

Mr. Cashatt: Excuse me, your Honor, my particular point is that the purpose is to show what any switchman or any member of the switch crew saw that night; that this isn't a true representation because there is such a difference in the time.

Now the evidence in the case is it was dusk. Here we can clearly show it is completely dark.

The Court: Well, the evidence in the case, one witness at least the jury can believe, it was very shortly before 8:30. Now if they can show the condition of darkness was comparable at the time these were taken at 8:30 on the 17th of July to the 23rd of June, I think that should be done, because you shouldn't have a different condition of [408] darkness.

Mr. MacGillivray: I think he can testify as to the darkness.

Mr. McKevitt: Another question I have in mind, your Honor, the fact that those white lights are on, I don't know how that would tend to establish any negligence on the part of the railway or prove any issue in this case.

The Court: I am not passing on that question, of course.

Mr. MacGillivray: We are going to get to that, Mr. McKevitt.

Mr. McKevitt: I understand that you are getting to everything after you get your evidence in.

(Testimony of Charles Libby, Jr.)

Mr. Etter: I wouldn't go so far as to say that.

The Court: There is evidence that there were lights on the dock. Now, of course, I think that should go to the weight of these, the number of lights on, some difference in conditions, not major ones. You are not placing any importance on the train?

Mr. MacGillivray: No, no, Leo was there.

Mr. Cashatt: None whatever.

The Court: Just happens to be out there.

I am inclined to admit them if you can show the conditions of darkness were approximately the same.

Court will recess for 10 minutes. [409]

(Whereupon, a short recess was taken, after which the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Well, I think you should show, if you can, that the conditions of darkness were comparable to the time of the accident.

Q. (By Mr. MacGillivray): Mr. Libby, Exhibit No. 20 was taken about what time?

A. I would say somewhere between 8:45 and 9 o'clock.

Q. And No. 21?

A. And somewhere within 15 or 20 minutes afterward.

Q. After that? A. That is correct.

Q. Could you tell the jury, Mr. Libby, what the

(Testimony of Charles Libby, Jr.)

condition of darkness is as between June 23rd in any given year and July 17th in that same year?

A. Well, after the peak of the year, which is about the 21st of June, the days start getting shorter, and I only know by the duck shooting times, when it opens and closes, it varies about a little over a minute a day; in other words, your light drops off just a little over a minute a day. In the afternoon, you have to quit shooting about a little over a minute sooner one day [410] than you did the day before.

Q. Do you always do that? A. Try to.

Mr. McKevitt: That is a break for the ducks.

Q. (By Mr. MacGillivray): Mr. Libby, to get the same degree of darkness as you would have at 8:25 on July 17th of a given year, you would take a picture at approximately what time on June 23rd of that same year?

A. Well, there is approximately—did you say July 17th?

Q. July 17th and June 23rd.

A. There is approximately 24 days difference, a week left in June and 17 days in July, would be about 24 days, so I would say that there would be about somewhere in the neighborhood between 26 and 30 minutes difference in time. In other words, your pictures taken on June 23rd should be taken about somewhere between 24 and 30 minutes later at night in order to get similar conditions of darkness that you would have on a picture taken the

(Testimony of Charles Libby, Jr.)

night of July 17th, assuming that weather conditions were the same both nights.

Q. Now the night of June 23rd last week when you were out there, what was the weather?

A. The weather was good. There was a very, very slight high overcast, but not enough to bother. I mean you could see a good sunset and the visibility was very clear. [411]

Q. As a matter of fact, Mr. Cashatt was out with Mr. Etter and myself when we took or when you took the pictures? A. That is correct.

Mr. MacGillivray: Again ask the admission, your Honor, of 20 and 21.

The Court: They will be admitted. The record may show the objection.

(Whereupon, the said photographs were admitted in evidence as Plaintiff's Exhibits 20 and 21.)

Q. (By Mr. MacGillivray): Now, Mr. Libby, if you would please step down here so the jury can see the pictures. I will try to make them as close to you as possible so you can all see them.

To the left-hand side of Exhibit 20, we see what appears to be two headlights, one brighter than the other? A. That is correct.

Q. Those two are what?

A. Apparently locomotive headlights or some similar bright light in the distance. [412]

Mr. MacGillivray: (To the jury) He is referring to the two lights, headlights.

Q. Then, Mr. Libby, would you point out on

(Testimony of Charles Libby, Jr.)

Exhibit 20 the ice dock in question and the white lights on top of that ice dock?

A. That is right here (indicating).

Q. Would you just walk along so everybody can see those, the dock and the white lights on it?

A. That is it (indicating).

Q. That is the dock here, kind of an oblong shape?

A. That's right, with the lights on the top.

Q. And over to the right-hand side of the dock with the white lights on it is another light, apparently in the rear?

A. That is correct.

Q. Do you know what that probably was?

A. Well, it could be either some other lights or it could be a train coming with the headlight of the locomotive.

Q. That is the light we see over here (indicating)?

A. That is correct.

Q. Now, Mr. Libby, in Plaintiff's Exhibit No. 21, would you just come along and point out to the jury where the icing dock was and the white lights shown on the top of the icing dock?

A. (Witness complies). [413]

Q. That is about in the center of both exhibits?

A. That is correct.

Q. Take the stand again.

Then, Mr. Libby, you took some colored photographs?

A. I did, yes, sir.

Q. I was a little mixed up on them. You delivered them to my office?

A. I did, with those——

(Testimony of Charles Libby, Jr.)

Q. I was out of town at the time?

A. That is correct.

Q. And a chap in my office, you asked him to take the pictures to Mr. Etter's office?

A. That is correct.

Q. Now the colored photographs, are they developed like this?

A. Well, they are developed, but they don't look like that in the sense that those are on paper and your color shots are on film.

Q. To someone who is not a photographer, they look like negatives?

A. That's right.

Q. And those were delivered to Mr. Etter's office?

A. Well, I don't know, they were delivered to your office and the gentleman there said he would take them to Mr. [414] Etter.

Mr. MacGillivray: I might explain to counsel that Mr. Day is on his way to Mr. Etter's office to bring those back. I think Mr. Etter thought they were negatives.

Mr. Etter: So did Mr. MacGillivray.

Mr. MacGillivray: I didn't see them.

All right, you may examine.

Mr. McKevitt: I understand these photographs have been admitted, your Honor?

The Court: Yes.

Mr. Cashatt: I would like to look at those, I have never seen them.

The Court: I think they are looking at those colored films now.

(Testimony of Charles Libby, Jr.)

Mr. Cashatt: I would like permission to look at them.

The Court: Yes, you should.

Q. (By Mr. MacGillivray): Then, after taking Exhibits—

The Court: Well, will you show them to Mr. Cashatt?

Mr. MacGillivray: Yes.

Q. Mr. Libby, after taking Exhibits 20 and 21 from Switch 13, did you then move back to some other point and take another black and white picture? A. That is correct.

Q. To what point? [415]

A. The yard foreman—what do they call it, of the office?

Q. Yardmaster.

A. Yardmaster's office, that's right.

Q. Yes. A. To the west of Switch 13.

Q. And did you take a picture from that point looking in an easterly direction toward the ice dock? A. I did.

Q. You had a little difficulty getting that shot, as I recall? A. I did.

Q. Why was that?

A. Well, trains and cars and switchmen, and so on.

Q. Headlights coming toward you, and so on?

A. That's right.

The Court: Is that 22 that you are talking about?

The Clerk: 22, your Honor.

(Testimony of Charles Libby, Jr.)

Mr. MacGillivray: 22.

The Court: 22. What was the hour of taking that?

Q. (By Mr. MacGillivray): What hour was Exhibit 22 taken?

A. That was immediately after the other two shots, I would say about 15 minutes.

Q. And referring to Plaintiff's Exhibit 22, is that the black and white picture taken from the yardmaster's [416] office looking in an easterly direction toward the icing dock?

A. That is correct.

Q. And does that picture show the icing dock and the white lights on top of the icing dock?

A. That is correct.

Q. In that picture there are some other lights. Could you tell us just what they are?

A. Well, there are some lights from some of the buildings and there are some lights from a couple of locomotives that were stationed or parked off——

The Court: Don't show it to the jury yet.

A. Parked off to the side. And then these irregular lights and irregularities in there were caused by the switchmen and the trainmen walking across with their lanterns and swinging them and jumping up on the trains and back down, and so on.

Q. I see.

The Court: Were those pictures time exposures?

A. They were, yes, sir.

The Court: What was the time of exposure?

A. About two minutes on the black and white.

(Testimony of Charles Libby, Jr.)

The Court: Is that true of 20 and 21, as well as 22? A. That is correct, yes. [417]

Mr. MacGillivray: I ask the admission of 22.

The Court: Have you seen it, counsel?

Mr. Cashatt: May I ask a question or two, your Honor?

The Court: Yes.

Mr. Cashatt: Mr. Libby, this line (indicating), is that what you meant that the switchman was waving a lantern?

A. He walked across there, he walked across there with his lantern. 4

Mr. Cashatt: You mean sometime after you started the exposure?

A. That is correct. Any bright light, locomotive headlight, that was on full, the bright beam, I would close the exposure, but any small lantern or anything, I didn't because it doesn't hurt anything.

Mr. Cashatt: Your Honor, I make the same objection to it. As far as time or anything, I can't see how it would be material.

The Court: The record may show your objection, Mr. Cashatt, and I will admit this Plaintiff's Exhibit 22, and I will say at this time that Exhibit 20 and 21, also, are admitted only for the limited purpose of showing the lighted dock, and any other lights or objects in there other than the dock are to be absolutely disregarded by the jury. [418]

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 22.)

(Testimony of Charles Libby, Jr.)

Q. (By Mr. MacGillivray): Now, Charlie, if you would step down again here and point out to the jury as we go along. The light over here (indicating), is that a light in the——

A. Either in the window or just outside the yardmaster's string of buildings there.

Q. That is the bright lights shown on the left side of Exhibit 22? A. That is correct.

Q. Then there is another light to the right of that, but still a little to the left of Exhibit 22; what is that? A. I believe this is a locomotive.

Mr. McKevitt: That is approximately in the center of the photograph, isn't it?

A. A little to the left of center.

Mr. McKevitt: A little to the left of center?

A. That's right.

Q. (By Mr. MacGillivray): Then would you point out to the jury, and I will bring this along, folks, just where the icing dock shows up and the white lights on the icing dock in that picture?

A. Right there (indicating).

Mr. MacGillivray: Now if you have no objection, Mr. McKevitt, I can take it, Charlie.

This light over here on the left is the light from the office, the yard office (indicating). These lights are apparently lights of the switch engine. The icing dock is shown again with the lights on top of it about in the center of the exhibit here. The white lines running across here are showing up exposure of some switchman walking across with his lantern.

Q. Now these colored photographs, you have to have a box or something to show them?

(Testimony of Charles Libby, Jr.)

A. That is the better way, yes, sir.

Mr. MacGillivray: You are going to have a box here, Mr. Cashatt?

Mr. Cashatt: After you use those other pictures.

The Court: I think I will ask counsel to step up to the bench just a minute.

(Whereupon the following proceedings were had before the bench out of the hearing of the jury:)

The Court: Like most judges, I suppose, I am a little fearful of the unusual, and I have never seen this type of picture used before, except in x-rays of injuries, and I would be very much afraid to put them in this record [420] unless you can put competent evidence on here that they are a correct representation of something that a person would see and show as it would be seen.

Mr. McKevitt: That's right.

The Court: Just having these colored film photographs, I don't think I should let them in in a case of this kind. We haven't any view box here.

Mr. MacGillivray: I don't think they show much.

The Court: We haven't any view box here. Do they show practically the same thing as these other pictures?

Mr. Etter: They don't show as much.

Mr. Cashatt: I didn't see anything in them.

Mr. Etter: I can't see a thing.

The Court: If you just offer them, I will sustain an objection to them, but, of course, I won't cut you off from trying to lay a foundation.

Mr. Etter: John, I can't tell what they are about.

(Testimony of Charles Libby, Jr.)

Mr. Cashatt: Have to have a actual box, Max.

The Court: Have to have a view box and we haven't got one.

Mr. Etter: You can't see a thing in them.

Mr. MacGillivray: I will clear it up.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. MacGillivray): These colored photographs marked as Plaintiff's Exhibits 23 and 24, as you say, you need a view box to show those up?

A. To the best advantage, yes, sir.

Q. If we had a view box, would these pictures show approximately the same as is shown in Exhibits 21 and 22?

A. That is correct, only the color.

The Court: We haven't any view box here, so you may——

Mr. MacGillivray: I will withdraw them.

You may examine.

Mr. McKevitt: 23 and 24 are not offered?

Mr. MacGillivray: No.

The Court: No, they are withdrawn.

Mr. MacGillivray: You can't see them.

(Whereupon, the said colored photographs, being Plaintiff's Exhibits 23 and 24 for identification, were withdrawn.) [422]

Cross Examination

Q. (By Mr. Cashatt): One thing I would like to clear up first, Mr. Libby, would you please step over here?

(Testimony of Charles Libby, Jr.)

Exhibit 16 has been admitted and I believe you took the two pictures and pasted these together, is that correct? A. That is correct.

Q. Step around so the jury can see. Now, Mr. Libby, in looking at that, it looks like there is a corner of a building here (indicating), it looks like the railroad track goes like this and then makes a right angle? A. That is correct.

Mr. McKevitt: Hard to get a boxcar around them.

Q. (By Mr. Cashatt): Will you please kind of explain it, because I know it has been a question here?

A. Well, the space allowed——

Q. Stand so the jury can see, please.

A. ——for the taking of this picture was so close; in other words, I couldn't get back far enough to get this entire distance in in one shot. There were boxcars behind me and I had just practically as much distance as maybe from here to that map (indicating), or a little more, and I couldn't get it all in one, so I made it in two shots and joined them together and, consequently, the [423] angle of view of this shot showing the right-hand side, that way, and then turning the camera and, this being the left-hand side butted against the right-hand side of this view, tends to give that impression.

Actually, this building is one straight building, as you see it there, only straighter, no joint, and the track is straight right through there. But due to the

(Testimony of Charles Libby, Jr.)

lack of distance, there was no other way to make it.

Q. Okay, I believe that is satisfactory.

The Court: Let's see, what number is that?

Mr. Cashatt: No. 16, your Honor.

The Court: You may take the stand again, Mr. Libby.

Q. (By Mr. Cashatt): Mr. Libby, handing you Exhibits 21 and 22, sir, you say that it took about a two minute exposure, did it, to take each of those photographs? A. That is correct.

Q. And when you are taking an exposure like that, Mr. Libby, if some light passes across in front of the lens at any time during the exposure, does that register in any way on the film itself?

A. It can, yes.

Q. And in Exhibits 20 and 21, Mr. Libby, over to the left-hand side I see a very bright light in the distance. Wasn't that the Northern Pacific's main streamliner that [424] was coming through at that time?

A. It could be, yes, sir.

Q. And is that the reason that we see light at that area and the area right below, is that correct?

A. You mean on the right-hand side here?

Q. Well, it would be on the left-hand side as I am standing here. A. That is correct.

Q. Now that same situation is shown, isn't it, Mr. Libby, in Exhibit No. 21, also, the light in the background off to the right of this picture of 21?

A. That is correct.

Q. Mr. Libby, I see some light in Exhibit 21 that

(Testimony of Charles Libby, Jr.)

appears to be ahead of the ice dock. Will you please look at that and see if you can find the light I am referring to there on Exhibit 21? It looks like a light ahead to the west of the dock.

A. I wouldn't necessarily say it was to the west of the dock. It could be, or it could be right near the end of the dock.

Q. Well, Mr. Libby, if a switchman was there with a lantern or anything like that, could that cause that light shown in that location we have just talked about?

A. I don't think a lantern would give that much light, take a brighter light than that. [425]

Q. In Exhibit No. 22, Mr. Libby, I believe you stated that was the one taken up by the yard office, is that correct? A. That is correct.

Q. The light shown in a circle there, would that be a switchman swinging a lantern?

A. That is correct.

Q. And in that picture we have the same situation, don't we; we have lights to the east of the ice dock somewhere in the background, is that right?

A. That is correct.

Q. I see.

Mr. Cashatt: That is all.

Mr. MacGillivray: Just one question, Mr. Libby.

Redirect Examination

Q. (By Mr. MacGillivray): In Exhibits 21 and 22, can you see in those pictures whether or not there are any cars upon the railway tracks immedi-

(Testimony of Charles Libby, Jr.)

ately south of the icing dock, on the first track to the south of the icing dock?

A. Yes, there are.

Q. Can you say whether or not there are any cars on the track immediately north of the icing dock? A. I believe not. [426]

Q. Do you mean there are or are not cars there?

A. There are not.

Q. And you could see that from Switch 13?

A. Yes.

Mr. MacGillivray: That is all.

The Clerk: Counsel, I think that is 20 and 21, rather than 21 and 22.

The Court: Yes.

Mr. Cashatt: That is all.

(Witness excused.)

Mr. MacGillivray: Call Mr. Prophet.

LaVERNE W. PROPHET

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Mr. MacGillivray: Your Honor, Mr. Prophet is being called as an adverse witness as an employee of the Northern Pacific for the purpose of cross examination only.

Mr. Cashatt: If your Honor please, I believe under Rule 43(b), that the plaintiff is calling Mr. Prophet as their own witness, because he is not an officer, a managing agent or anything that would put him under the rule.

(Testimony of LaVerne W. Prophet.)

The Court: I think the jury may as well step out for a moment.

(Whereupon, the following proceedings were had [427] in the absence of the jury:)

The Court: The matter of calling adverse witnesses is governed by Rule 43(b) of the Rules of Civil Procedure, which provides that a party may interrogate an unwilling or hostile witness by leading questions. But, of course, you can't very well assume at the outset that a party will be hostile or unwilling. If he is an employee of the opposing party, naturally, you would perhaps expect that to occur, but if it does, then you may be permitted to use leading questions in his examination as it progresses, if that becomes necessary. But to call a party as an adverse witness, he must be either the adverse party or an officer, director, or managing agent of either the adverse party, or an officer, director or managing agent of a private corporation.

What is his capacity with the Northern Pacific?

Mr. MacGillivray: I might show it in the record, your Honor.

Mr. McKevitt: Switch foreman.

Mr. MacGillivray: In charge of the switching operation with which we are concerned here on behalf of the Northern Pacific Railway.

Mr. Cashatt: He is not the managing agent at the yard, your Honor, at the time this occurred; he was just an employee working there. [428]

Mr. MacGillivray: He was acting as the one in

(Testimony of LaVerne W. Prophet.)

charge of the very operation with which we are here concerned on behalf of the Northern Pacific Railway on the night of July 17th.

Mr. McKevitt: You mean by that that he was the man that was responsible for that switching movement being made on that track? That is not the fact.

Mr. MacGillivray: The fact is that he was in charge of that switching movement on behalf of the Northern Pacific Railway.

Mr. Cashatt: That wouldn't make him the managing agent, your Honor.

The Court: Well, let's see, officer, director. He isn't an officer or director. He would have to be a managing agent, wouldn't he?

Mr. MacGillivray: Yes.

The Court: Just what is a managing agent, now, within the meaning of the rule?

Mr. McKevitt: A managing agent might be a division superintendent, classify him as that. This man has several men over him out there, I think the evidence will disclose that night. In that switching movement, he was acting under the orders and directions of the yardmaster; isn't that correct?

The Witness: Yes, sir. [429]

Mr. McKevitt: Sure.

Mr. MacGillivray: I think, your Honor, you could carry that argument to an absurdity and reach the point where Mr. McKevitt could argue the only one we could call as an adverse party would be Mr. McFarland or some vice-president of

(Testimony of LaVerne W. Prophet.)

the road, because the division superintendent works under Mr. McFarland's supervision; the district superintendent perhaps works under the division superintendent; the yardmaster works under the district superintendent; Mr. Prophet was in charge of this operation working under the supervision of everybody ahead of him.

Mr. McKevitt: What classification of the rule does he fall under? The rule is specific. If there is any absurdity, it is not McKevitt's absurdity, it is the rule makers' absurdity.

Mr. MacGillivray: That he was the managing agent, managing conduct of the operation conducted by the Northern Pacific on the night of July 17th with which we are here concerned. He so testified by deposition and counsel knows it.

The Court: He was in charge of switching operations, yes.

Mr. Cashatt: No, he wasn't, your Honor, he was just in charge of one switch crew and there were several switch crews that were taking orders from the yardmaster. This man [430] doesn't say what cars to move; he just follows instructions.

Mr. McKevitt: Or where to put them.

Mr. Cashatt: And I submit that certainly doesn't make him a managing agent in accordance with the rule.

Mr. MacGillivray: I submit, your Honor, on the further ground that the witness is a hostile witness; in fact, the *facting* being that his deposition was taken in Mr. McKevitt's office on June 18, 1954,

(Testimony of LaVerne W. Prophet.)

and that on numerous occasions during the taking of that deposition, the witness was instructed by both Mr. McKevitt and Mr. Cashatt not to answer questions put him, put to him by myself in taking that deposition. I think hostility is evidenced by the deposition.

Mr. McKevitt: That makes Cashatt and McKevitt hostile, but it doesn't make the witness hostile.

Mr. Cashatt: If it develops the witness is hostile, certainly they have a right to cross-examination. On the other hand, in accordance with the rule, we also have the right of cross-examination within the scope of the direct.

The Court: Well, I think you would have that even in the case of an adverse witness. About the only difference seems to be that in the case of an adverse witness, they have the right to impeach him and cross-examine. On a hostile witness, they merely have the right to ask leading [431] questions. I don't believe that he comes strictly within the rule of an adverse witness, but certainly one would expect him to be not too friendly, the foreman of the railroad company, in a situation of this kind, and I would suggest that you start examining him as a witness here, and if it becomes apparent that you need to lead him, I will permit you to do so. The other side may cross-examine then within the scope of the direct. They have the right of cross-examination, though, I don't think you can deprive them of that.

(Testimony of LaVerne W. Prophet.)

Mr. MacGillivray: I was going to make this suggestion, if there is any question on the point; that I will examine the witness on the subjects I have in mind; if I am at any time surprised by his answers, I will call it to your Honor's attention and then proceed to cross-examine him.

The Court: Yes, all right, that may be the proper solution.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Direct Examination

Q. (By Mr. MacGillivray): Your full name, Mr. Prophet? [432]

A. LaVerne W. Prophet.

Q. And your occupation? A. Switchman.

Q. For who?

A. Northern Pacific Railroad.

Q. For how long have you been employed as a switchman for the Northern Pacific?

A. Over 10 years.

Q. And where is the place of your employment?

A. Yardley, Washington.

Q. And how long have you been employed as a switchman at the Yardley yards?

A. Since February the 27th, 1944.

Q. Has all of your time in the employ of the Northern Pacific been consumed at the Yardley yards? A. No, sir.

Q. The majority of it? A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. Now as a switchman, Mr. Prophet, what generally are your duties at the Yardley yards?

A. We get our instructions from the yardmaster, we proceed to take them, go out and do the work. It generally consists of a list that he will hand to us, and we will take this list, read it, go to the track that is designated at the top of the switch list, proceed to [433] get the number of cars or car or caboose, whichever the case may be, and put it on the tracks that are designated for certain cars going in specific ways.

Q. In short, as a switchman, you are engaged in the making up of trains leaving the Yardley yards and tearing down the trains terminating at the Yardley yards?

A. Yes, sir.

Q. And you have been doing that for about 10 years at Yardley?

A. Yes, sir.

Q. Now were you so engaged on July 17, 1952?

A. Yes, sir.

Q. What shifts do you have out there at the Yardley yards?

A. The schedule calls that an engine can be started between the hours of 6:30 in the morning and 8 in the morning; between the hours of 2:30 in the afternoon and 4 in the afternoon; and between the hours of 10:30 and 12 at night.

Q. And over this 10 year experience, have you worked all those different shifts?

A. Yes, sir.

Q. On July 17, 1952, what shift were you working?

(Testimony of LaVerne W. Prophet.)

A. I was working from 3:15 to 11:15 p.m.

Q. Did you have supper there at the yard that night? A. Pardon? [434]

Q. Did you have supper there at the yard there that night? A. No, sir.

Q. Where did you have your lunch or dinner or supper, as you might call it?

A. Went over to the Parkwater Cafe and ate.

Q. About what time?

A. I left the yard office at 8:20.

Q. And between 3:15 and, we'll say, 7:30, what had you been doing? A. Pardon?

Q. Between 3:15 in the afternoon of July 17, 1952, and, we'll say, 7:30 that evening, what had you been doing? A. Switching cars.

Q. Where in relation to the yardmaster's office? Different points?

A. Different points, yes, sir.

Q. Now, Mr. Prophet, did you discover on the evening of July 17, 1952 that there had been a serious accident at the Yardley yards in the vicinity of the Addison Miller ice dock? A. Yes, sir.

Q. About what time did you get that information?

A. I got that information about 8:40 or 45.

Q. Was that before you had gone to dinner or when you returned? [435]

A. Upon my return.

Q. And from whom did you get that information?

A. The engineer was the first one that told me.

(Testimony of LaVerne W. Prophet.)

Q. His name is Jim Pilik? A. Yes, sir.

Q. Now what time did you go to lunch that evening? A. 8:20.

Q. Immediately before 8:20 p.m., July 17, '52, had you been engaged in a switching operation?

A. Yes, sir.

Q. What was that operation?

A. We were given orders on a switch list to go to the west end of Track 43, get 14 cars, put them on Track 13.

Q. And at what time did you get those orders?

A. I couldn't say definitely, sir.

Q. Well, was it immediately before that operation started or earlier during the day?

A. It could have been and it could not have been. We might have had the orders and we could have been blocked and had to wait to fulfil the orders, or it might have been—I just don't recall exactly when we did get the orders.

Q. And about what time did you start that switching operation, taking 14 cars from Track 43 to put those 14 cars on Track 13? [436]

A. I would say approximately, I don't know definitely, but around 8.

Q. And who was in charge of that actual operation? A. The yardmaster.

Q. Was the yardmaster out personally engaged in that operation? A. No, sir.

Q. Well, who was in charge of the actual operation on the ground? A. I was, sir.

Q. Did you have a crew under you?

(Testimony of LaVerne W. Prophet.)

A. Yes, sir.

Q. Consisting of how many men?

A. Two men and myself, sir.

Q. You are referring to two switchmen?

A. Yes, sir.

Q. And was an engine used in that operation?

A. Yes, sir.

Q. How many men on the engine?

A. Engineer and fireman.

Q. Mr. Prophet, have you seen this exhibit here, the large map straight ahead of you?

A. No, sir.

The Court: Are you going to use the map?

Mr. MacGillivray: I was going to put it up, your [437] Honor, yes.

The Court: I think we may as well recess and you can put it up during the recess.

Court will recess this case until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 p.m., this date.) [438]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to-wit.)

LaVERNE W. PROPHET

a witness called on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. MacGillivray): Do I understand, Mr. Prophet, that you haven't seen this exhibit, which is Defendant's Exhibit 1, before?

A. I have not.

Q. Would you step down and take a look at it and see if you know what it is?

A. (Standing at exhibit): General conception of the Yardley yard.

Q. Well, you recognize over on the left-hand side of the exhibit the yard office, and to the right-hand side the tunnel from the ice plant over to the salt house and icing platform?

A. Yes, sir. [439]

Q. Then the lines here are railroad tracks?

A. Yes, sir.

Q. And you run from Track 1 here, 2, 3, 4, 5, 6, 7, and the main line is Track 8?

A. Yes, sir.

Q. The Old Maine, Track 9, 10, 11 and 12, 13, to the north of the icing dock, and 14 to the north of 13?

A. Yes, sir.

Q. Now you mentioned, Mr. Prophet—just stand here, I will use you on the map—that this switching operation was to take 14 cars off of Track 43 and to move them into Track 13?

A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. Now is Track 43 shown on the exhibit?

A. No, sir.

Q. Could you tell us about where it is?

A. Track 43 would come on off in this direction and slant out this way, this angle, to the yard (indicating).

Q. Would you take a pencil and draw in—you don't have to be exact, Mr. Prophet, but approximately where Track 43 comes into the other tracks?

A. We would take off from this lead here at the crossover (drawing) and go down—these are not perfect scale or anything.

Q. That's right. [440]

A. This is just a general idea of it, because I don't believe I could draw a very good picture.

Q. I understand.

A. And we go down here to what we call the "hell hole." That is a hole in the yard where cars are—it is where we have short tracks, they are not long tracks such as 1, 2, 3, 4, 5, on up to 13.

Q. Well, would the lines that you have drawn on here represent Track 43?

A. No, sir, I am coming to that, please.

Q. Fine.

A. Then we have a take-off that we call the roundhouse lead going on down toward the roundhouse. We also have a track that comes out here like this and going on down to the roundhouse that we call the outbound, that is, for engines coming out from the house on this track, hit this switch and come out to the "hell hole" lead up to the

(Testimony of LaVerne W. Prophet.)

crossover here and on through these tracks here going to the main line.

Q. Both of these tracks, then, lead to the roundhouse?

A. These both are roundhouse tracks.

Q. Would you write in there "To Roundhouse?"

A. This one is inbound.

Q. Inbound to roundhouse?

A. And this is outbound. [441]

Q. Outbound from roundhouse.

A. Now we have a track that takes off similar in this manner (drawing). That is Track No. 43.

Q. Well, would you write "Track 43" on that?

A. Track 43 (writing). And in here we have what we call an inside switch takes off to Track 42.

Q. All right, Mr. Prophet, the orders you had were to move 14 cars from Track 43 and get them down to Track 13? A. Yes, sir.

Q. What was the first thing that was done in carrying out those orders?

A. We received the orders from the general yardmaster's office, which is this building here (indicating). Now we could have these orders in this locker room or we could have received them here on what we call a lead; that is, working along here, this is known as a lead here (indicating).

Q. The lead is the track on which the switch is shown? A. Yes, sir.

Q. All right.

A. But the engine was sitting somewhere in this vicinity (indicating) when we received the orders.

(Testimony of LaVerne W. Prophet.)

Q. Well, that is approximately opposite——

A. The yard office.

Q. ——yard office? [442]

A. On the Old Main.

Q. Old Main? A. Yes, sir.

Q. All right.

A. We then take the engine, through hand signals, which is still daylight. Backup hand signal is the arm moved toward you. Now that means to come to me. Now that can be either reverse movement or a forward movement, depending upon where you are standing. You are my engineer right now, that signal would be come ahead to me, and if I wanted you to reverse, I would give you a back-away-from-me sign. That is a backup sign in daylight (indicating). A stop sign is the arm or both arms dropped from horizontal to your sides.

Q. Well, now, the engine that you were going to use, which was Jim Pilik's engine, correct?

A. Yes, sir.

Q. Was on the Old Main opposite the yard office headed in what direction?

A. The engine in switching service is always headed west with the rear of the engine in the east.

Q. So that you gave a signal to Pilik, the engineer, to reverse or go backwards and by hand signals led him up to Track 43?

A. Yes, sir. You come down through here, throw this [443] switch to get to the inbound, because you have started toward the inbound, you throw this switch here, which puts you on the outbound, and

(Testimony of LaVerne W. Prophet.)

go into 43. You have to stop here, throw this switch, because it is always lined for the inbound—or the outbound switch. You never leave a switch against an engine coming out. They are always lined to protect the engineer.

Q. Now who lined those switches from the yard office up to Track 43?

A. I don't recall definitely, but I believe I did, I wouldn't say for sure. We went in here, stopped somewhere back in here, because cars are left in the clear where a person will not be knocked off of it if he is hanging on the side, which we do quite a bit of, handing from the ladders with our foot in the stirrups, riding out or riding in, riding any place, going on top of cars. We ride on top of cars, also.

Q. How many cars were there, freight cars, on Track 43?

A. That I couldn't say.

Q. Your orders were to disengage 14 of them and take them down to 13?

A. Yes, sir.

Q. Now how does the engine backing up become coupled to the most easterly or westerly of those 14 cars?

A. You have what they call an automatic coupler. They are [444] open like this (indicating), and when they come together, they close in this manner. That is what they call an automatic coupler. And that joins your cars together so they can be pulled or pushed.

Q. Then who disengaged the 14 cars from the other cars to which they were attached?

(Testimony of LaVerne W. Prophet.)

A. If there were any other cars, I did.

Q. And about what time did that take place?

A. I would say somewhere in the vicinity of 8 o'clock.

Q. And so then you had the engine headed west on Track 43 and 14 freight cars attached to the engine?

A. Yes, sir.

Q. What was the next procedure?

A. The next procedure was to come around, line 13 Switch.

Q. Someone walked over from Track 43. Would you write in there "13 Switch" so we will know which one it is?

A. (Witness complies.)

Q. Someone walked over from Track 43 to No. 13 Switch and lined, as you call it, 13 Switch?

A. Yes, sir.

Q. That is, adjusting 13 Switch so that cars coming off of the lead would then take off on to Track 13?

A. That's right.

Q. Who did that?

A. I did. [445]

Q. And after that was done, Mr. Prophet, what was the next step?

A. Standing at this switch, you can see your dock here (indicating). They have blue lights at each side covering the tracks which those lights are over. Looking down, there is no blue light on either track, you can see them from here, I walked back to my engine and proceeded up.

Q. How far was it from where the engine was on Track 43 to this switch?

A. Definitely, exactly, I don't know.

(Testimony of LaVerne W. Prophet.)

Q. Approximately?

A. I would say approximately somewhere from 40 to 50 yards, maybe more, maybe less.

Q. And would you, with the red pencil, put on Track 43 an "X" as being the approximate position of the engine before you started back to Old Main?

A. I wouldn't remember where that was. I know it would be somewhere in there that the cars were in the clear. The engine is quite long, it has a coal tender behind it, and 1200 series engine and I don't know the length of those, and I don't just exactly know the length from the switch to the clearance points because I have never measured it.

Q. Well, can you put approximately where it was without [446] tying it down?

A. We were tied on somewhere in here (indicating), so the engine would be somewhere around the switch.

Q. Well, now, would you mark with an "X" where the engine was approximately?

A. The engine was sitting within this scope somewhere (indicating).

Q. Would you put an "X-1" and your initials there? A. (Witness complies).

Q. Then, Mr. Prophet, after you got back to the engine, what then transpired?

A. Then we came out the way we went back, up over the switch. This is the "Hell Hole" crossover switch (indicating).

(Testimony of LaVerne W. Prophet.)

Q. And did all cars, the 14 cars, cross over the "Hell Hole" switch and get on to Old Main?

A. Yes, sir.

Q. And was the engine then stopped?

A. Yes, sir.

Q. And where were the cars stopped at that time on Old Main with reference to the yardmaster's office?

A. The rear car was somewhere within this vicinity here (indicating).

Q. And would you put an "X-2" with your initials at that point? [447]

A. (Witness complies.)

Q. How long is the average freight car?

A. The average freight car is about 40 feet, 6 inches.

Q. So that they extended up west of the yard office for 500 to 600 feet?

A. Something like that, whatever 14 times 40 would be, approximately. There might have been some 50 foots or might have been some short cars in there, which are 36 footers.

Q. Well, it would be fair to say from 500 to 600 feet?

A. Somewhere in there, yes, sir.

Q. And when they were stopped at that point, the engine was to the west, headed west?

A. Yes, sir.

Q. Then when that was done, Mr. Prophet, did you go into the yard office?

A. I don't remember, sir.

(Testimony of LaVerne W. Prophet.)

Q. Who was the yardmaster that night?

A. Mr. Crump.

Q. Did you have some discussion with Mr. Crump, either in the yard office or immediately outside of the yard office, while those cars were standing there in front of the yard office?

A. I don't recall exactly whether we had while they were standing there or whether it was immediately after we [448] moved them.

Q. And about what time did you get those cars down there and stopped?

A. I would say somewhere a few minutes after 8.

Q. Well, how long was it after you lined up Switch 13?

A. I would say somewhere around 15 minutes.

Q. Around 15 minutes?

A. Yes, sir, that is what I had in my deposition and in my statement previously.

Q. Well, and that is correct, isn't it?

A. Yes, sir.

Q. And how long did those cars remain standing there in front of the yard office before they were again put in motion?

A. That would be hard to see again, sir.

Q. Well, approximately?

A. There wasn't any talking going on, they were evidently put right into movement, or if there was somebody else using this other lead over here, we would have waited on them, because you wouldn't let the cars go together in a side collision.

Q. Well, you recall that that night you did have

(Testimony of LaVerne W. Prophet.)

to wait for some other switching operations on the lead before you put those 14 cars in motion?

A. I don't recall whether I did or not. [449]

Q. You don't. Well, then, what was the next step before the cars were put in motion or to put them in motion?

A. There was a backup signal given to the engineer, come on back (indicating). When the engine got fairly close, I would say, oh, from here to the back wall, he was given an "easy" sign, slowing the cars down still further. But when he came alongside of the pin puller, the third man on the crew, he was given what we call a "pin sign," the pin sign was given, and the man proceeded to pull the pin on the cars and let them drift away.

Q. In other words, when that pin is pulled—that is the pin between the rear of the engine and the first freight car? A. That's right.

Q. And when that pin is pulled, the 14 cars are disengaged and started floating down Old Main?

A. That's right.

Q. And is it correct that they floated down from the position marked "X-2" or approximately that position? A. Approximately that position.

Q. Along Old Main and over the crossover switches onto the lead in the direction shown in the red pencil here (indicating); then over No. 13 Switch, they continued to drift down No. 13 Track until they reached some point [450] down here (indicating)? A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. That is the direction, of course, of those 14 cars?
A. Yes, sir.

Q. Now was anyone in attendance on the top of those cars?
A. No, sir.

Q. On the sides of those cars?

A. No, sir.

Q. The cars were drifting down there all by themselves?
A. That is right.

Q. About what speed?

A. At about 3 to 4 miles an hour, which is switching speed.

Q. That is switching speed?
A. Yes, sir.

Q. Mr. Prophet, do you know how far it is from 13 Switch to the icing dock?

A. Not exactly, no, sir.

Q. The engineer told us about 1,200 feet, is that approximately correct?

A. Could be, yes, sir.

Q. Do you know how far it is from the yard office to the icing dock?

A. Not exactly, no, sir.

Q. The engineer told us approximately 2,050 feet; would that be about correct? [451]

A. That would, sir.

Q. In other words, from the time one of your men pulled the pin up here, those cars had to drift down at least 2,000 feet at 3 to 4 miles an hour before reaching the icing dock?
A. Yes, sir.

Q. You can take the stand again.

Now, Mr. Prophet, you have told me that it was approximately 15 minutes from the time that you

(Testimony of LaVerne W. Prophet.)

lined No. 13 Switch until the cars reached the front of the yard office and the engine was called to a stop there? A. Yes, sir.

Q. And about how much longer was it, or how many minutes in all was it, from the time you lined 13 Switch until your man pulled the pin and turned the 14 cars loose drifting in a westerly direction down toward Track 13?

A. I wouldn't know that, sir.

Q. Well, would you say it was at least 20 minutes? A. Could be.

Q. Could be. Could it be 25 minutes?

A. I wouldn't know, it could have been.

Q. I see. Well, could it have been more than that? A. I doubt that very much, sir.

Q. Well, would it be fair to say that it was some place between 20 and 25 minutes? Would that be correct? [452]

A. There is quite a few things to take into consideration on that one, Mr. MacGillivray.

Q. I realize that.

A. But it isn't fresh in my mind, it has been almost two years ago, and at the time that those cars were cut loose and were leaving, we had no idea whatsoever that Mr. Stintzi would have been hurt and, therefore, we weren't paying any attention to those cars particularly until afterwards.

Q. Mr. Prophet, you were there and knew all the different procedures you went through that night before those cars were turned loose. Now would it not be fair to say that it was approxi-

(Testimony of LaVerne W. Prophet.)

mately 20 to 25 minutes from the time you lined Switch 13 until those cars were turned loose in front of the yard office?

A. Mr. MacGillivray, I don't think that it would be fair for me to set any time on that.

Q. Well, Mr. Prophet, you do know it was more than 15 minutes? A. Yes, sir.

Q. Now, Mr. Prophet, you have been working there at that yard for about eight years?

A. At the time, yes, sir.

Q. Prior to the time that Gerry Stintzi was hurt? A. Yes, sir. [453]

Q. And in your work there, you became fully familiar with every operation about that Yardley or Parkwater switching yards?

A. Not every one, no, sir, because you learn something new every day.

Q. Well, you were familiar with all the switching operations?

Mr. McKeivitt: If your Honor pleases, object to the form of these questions. They are all leading questions, questions in the nature of cross examination.

Q. (By Mr. MacGillivray): Insert the word "were" first, were you familiar with all switching operations? A. That I had had, yes, sir.

Q. And were you familiar, over this 8-year period, with the operations conducted at the Addison Miller icing dock?

A. How do you mean that, Mr. MacGillivray?

(Testimony of LaVerne W. Prophet.)

Q. Well, did you know what operations went on there?

A. I had never worked on the dock, no, sir.

Q. Had you ever been on the dock?

A. I might have, yes.

Q. Well, Mr. Prophet, were you familiar with what went on down there at the Addison Miller icing dock from your 8 years experience out there at the yards?

A. As far as the actual operations of Addison Miller, no, sir, I have never been present on their operations. [454]

Q. Well, did you know what they did down there at the dock?

A. I know what they do down there, yes, sir.

Q. And when is their busy season down there at the dock?

A. In the summertime when they have fruit trains.

Q. In the months of July and August?

A. Well, any time when they have fruit in season.

Q. Well, their particular busy time is in the summer months? A. Yes, sir.

Q. And did you know how many shifts they ran, say, in the months of July and August, down there at the icing dock? A. No, sir.

Q. Did you know from your 8 years experience that they were icing cars all hours of the day and night down there? A. Yes, sir.

Q. And did you have any knowledge of the type

(Testimony of LaVerne W. Prophet.)

of crew that they had down there at Addison Miller, whether it was a permanent crew or a transient crew?
A. I had no idea, no, sir.

Q. Did you have any knowledge from your 8 years experience as to whether or not the Addison Miller Company employed and had working on that dock at all times young high school kids?

A. I had no knowledge of who they had working there.

Q. No knowledge. Hadn't you ever been around that dock at all, Mr. Prophet? [455]

A. How do you mean that, please, Mr. MacGillivray?

Q. Well, switching on Track 14 or switching on Track 11 or on Track 10 and walking up and down your tracks on both sides of that dock?

A. Mr. MacGillivray, we are not allowed on the dock proper.

The Court: That answer wasn't responsive. I think you may cross examine him, if you care to do so, Mr. MacGillivray.

Mr. MacGillivray: Yes.

Would you read the question back? Please answer the questions, Mr. Prophet.

(The question was read.)

Q. Hadn't you done that?

A. Noticed the employees on there?

Q. Yes?

A. I had noticed them on there, yes, sir, but what they were doing or who they were, no.

Q. And during this 8 years, Mr. Prophet, had

(Testimony of LaVerne W. Prophet.)

you ever noticed employees working on that dock after hours of darkness? A. Yes, sir.

Q. What light was provided for the employees on the Addison Miller dock while working there during hours of [456] darkness?

A. They have white and blue lights.

Q. They use the blue light to work by?

A. Not to work by, no, for their protection.

Q. The question is, Mr. Prophet, from your 8 years experience, did you know what lights were provided on the Addison Miller dock for the employees to work by at night?

A. White lights to work by.

Q. And you had known that for over this 8 year period? A. Yes, sir.

Q. And you had known from experience in seeing that dock and being by the dock at night that whenever employees were working at night, the white lights on the top of that dock were illuminated; you knew that, didn't you?

A. Yes, sir.

Q. Now, Mr. Prophet, you left Track 43 before the train with 14 cars was put in motion back toward the yard office and walked over and lined up, did you say, No. 13 Switch? A. Yes, sir.

Q. And when you lined up No. 13 Switch, did you look easterly toward the icing dock?

A. Yes, sir.

Q. What did you see? [457]

A. On Track 13, there were some cars down around the ice dock.

(Testimony of LaVerne W. Prophet.)

Q. What else did you see?

A. That is all that I recall.

Q. Were there any cars on Track 12 at that time? A. I don't remember.

Q. The only thing you recall seeing as you looked down toward that dock was some cars on Track 13? A. Yes, sir.

Q. How many cars?

A. I do not know, sir.

Q. Those cars extended from what point to what point alongside that dock?

A. I do not know, sir.

Q. What was the visibility toward the east as you lined up No. 13 Switch? A. Dusk.

Q. Mr. Prophet, when you lined up 13 Switch and looked down toward the ice dock, did you see the white lights illuminated on top of that dock?

A. I don't recall seeing them, no, sir.

Q. Have you ever seen the white lights illuminated on the top of the dock from the location of No. 13 Switch at night? A. Yes, sir. [458]

Q. Handing you, Mr. Prophet, what are marked as Plaintiff's Exhibits 20 and 21, first referring to Exhibit 20 which is a picture taken from No. 13 Switch looking toward the east and the icing dock, do you see the icing dock there? A. Yes, sir.

Q. Do you see the lights, the white lights to which we have made reference on the top of that icing dock? A. Yes, sir.

Q. And is that the view you get from No. 13

(Testimony of LaVerne W. Prophet.)

Switch at any time at night looking down toward the icing dock from that switch?

A. Again, please, sir?

Q. Well, is that the view of the icing dock and the lights on the icing dock that you get at night looking down toward the icing dock from No. 13 Switch?

A. When the lights are on, yes, sir.

Q. And does the same apply to Plaintiff's Exhibit No. 21? A. Yes, sir.

Q. Now as I understand it, Mr. Prophet, when you lined up 13 Switch and looked down toward that dock, you don't recall whether the lights were on or not? A. That's right, sir.

Q. Did you pay any attention, Mr. Prophet, as to whether or not those lights were on or off? [459]

A. White lights?

Q. Yes? A. No, sir.

Q. Well, Mr. Prophet, from your 8 years experience down there, did you know that when the white lights were on on the top of that dock and illuminated at night, that that meant in all probability there was an Addison Miller crew working on and around that icing dock?

Mr. McKevitt: Objected to as cross examination of his own witness.

The Court: Overruled, he may answer.

Mr. MacGillivray: Would you read the question?

(The question was read.)

A. In all probability, yes, but not necessarily so.

(Testimony of LaVerne W. Prophet.)

Q. The probabilities were if the white lights were on, that men were working on and around that dock? A. As a probability, yes, sir.

Q. Yes. Mr. Prophet, did you take that probability into consideration when you lined up 13 Switch and looked down toward the icing dock on the night of July 17, 1952?

A. I was looking for a blue light, Mr. MacGillivray.

Mr. McKevitt: Keep your voice up, please.

A. I was looking for a blue light.

Q. (By Mr. MacGillivray): And you were paying no attention [460] whatsoever to the white lights? A. No, sir.

Q. Do I understand from that, Mr. Prophet, that you were depending entirely on the presence or absence of a blue light at the Addison Miller dock when you lined up 13 Switch?

A. Yes, sir.

Q. Mr. Prophet, from your 8 years experience out there prior to July 17, 1952, did you know as a fact that the blue light signal at the Addison Miller dock was habitually disregarded by the foreman of Addison Miller? A. No, sir.

Mr. McKevitt: I object, if your Honor please. For the purpose not to be continually objecting, I want a general objection to this method of examining this witness on the ground he is a hostile witness and not an adverse witness.

Mr. MacGillivray: I will change the form of the question.

(Testimony of LaVerne W. Prophet.)

Q. From your 8 years experience, Mr. Prophet, out there in the yards, can you tell me whether or not the blue light signal at the Addison Miller dock was habitually disregarded by Addison Miller foremen? A. I wouldn't know.

Q. You wouldn't know? A. No, sir. [461]

Q. Well, do you know, Mr. Prophet, that during your 8 years experience, or can you tell me whether during your 8 years experience, you had on many occasions seen men working at night on and about the Addison Miller dock, icing cars on Track 12 and Track 13, with no blue light illuminated?

A. Yes, I have, with the exceptions of occasions where the fruit train pulls into the yard and fills up the complete track. Everyone knows that the train is in the yard.

Q. Just—

Mr. Cashatt: Let him answer the question.

Mr. MacGillivray: He can answer the question yes or no.

Q. The question, again, is did you know the night of July 17th and prior to that time in your experience, that you had seen men working on the Addison Miller dock, on top of cars, on Tracks 12 and 13 beside the dock, without the blue light illuminated? Now had you seen that? A. Yes.

Q. And had you seen that on many occasions?

A. Not many, no, sir.

Q. Well, how would you put it, quite a few occasions? A. Yes, sir. [462]

(Testimony of LaVerne W. Prophet.)

Q. Did that occur to you, Mr. Prophet, when you lined up 13 Switch and looked down toward the Addison Miller icing dock the night of July 17, '52?

A. No, sir.

Q. Mr. Prophet, before those 14 loose cars were turned loose at the yardmaster's office the night of July 17, 1952, did anyone on your switching crew give any warning of any nature to anyone who might have been working on and about the Addison Miller icing dock and adjacent to Track 13?

A. Not to my knowledge, no.

Q. Is there a loudspeaker system at the Yardley yards?

A. Yes, sir.

Q. And how does that operate?

A. From the yardmaster's office.

Q. And do you have loudspeakers located throughout the yard?

A. Yes, sir.

Q. How many of them?

A. Three.

Q. And they are located where?

A. One is located south of the Havana—south of the main line, one in the middle of the yard, and one on the east end of the yard.

Q. The first one is where? [463]

A. South of Havana and south of the main track—or west of Havana and south of the main line track.

Q. That would be at the west end of the yard?

A. Yes, sir.

Q. And No. 2 is where?

A. In the middle of the yard.

Q. And No. 3 is where?

(Testimony of LaVerne W. Prophet.)

A. At the east end of the yard.

Q. Now the one in the middle of the yard is located where with reference to the Addison Miller icing dock?

A. A few car lengths this side of the building going up, or the shed going up to the ice dock.

Q. Do you know how far to the west of the ice dock? A. No, sir.

Q. Approximately 100 feet?

A. I wouldn't know, sir, somewhere in there, more or less.

Q. If you would step down here a minute, Mr. Prophet. Referring to what is marked as Plaintiff's Exhibit 15, do you see on that exhibit the west end of the Addison Miller icing dock?

A. Yes, sir.

Q. And do you see on that exhibit the loud-speaker system west of the icing dock to which you have referred? A. Yes, sir.

Q. Would you point it out to the jury? [464]

A. This pole here holds it (indicating).

Q. And on that pole——

The Court: I suggest you make some mark on the picture for the record.

Mr. MacGillivray: Yes.

The Court: Or have him make a mark.

Mr. MacGillivray: Now who has got a pencil?

Q. If you would just mark, Mr. Prophet, on there with an "X" and your initials on Plaintiff's Exhibit 15 the position of the loudspeaker system to the west of the Addison Miller icing dock.

(Testimony of LaVerne W. Prophet.)

A. (Witness complies.)

Q. Take the stand.

Mr. Prophet, what are the various purposes for which that loudspeaking system is maintained?

A. To inform switchmen of bad orders and other changes within their lists when they are down within the yard.

Q. Is that loudspeaker system maintained and used at any time to advise and warn of the movement of cars? A. Used to——?

Mr. MacGillivray: Read the question.

(The question was read.)

A. Is used to make movements of cars?

Q. Well, you can answer the question yes or no.

Mr. MacGillivray: Read the question again.

Mr. Cashatt: If your Honor please, I don't believe the question is very clear.

The Court: Well, let's have it read and see.

(The question was again read.)

A. I have never heard any warnings from it, no, sir.

Mr. MacGillivray: Cross examination, your Honor.

Q. Mr. Prophet, you remember being up in Mr. McKevitt's office on the 18th of this month?

A. Yes, sir.

Q. And I took your deposition?

A. Yes, sir.

Q. Referring to Page 35——

The Court: Pardon me, the record may show

(Testimony of LaVerne W. Prophet.)

an objection to this type of examination without your repeating it each time.

Mr. Cashatt: That is fine, your Honor.

The Court: You have a standing objection. Go ahead.

Mr. MacGillivray: To clear the record, your Honor, I am claiming surprise at the last answer of the witness.

The Court: All right.

Q. (By Mr. MacGillivray): Mr. Prophet, I will ask you if at that time this question was not asked of you by myself and if this did not take place and you did not give this answer: [466]

“Question: And I will ask again if, to your knowledge in your 8 years experience, that these two speakers connected with the loudspeaker system had ever been used to advise of the movement of cars?”

“Mr. McKevitt: So far as Addison Miller employees are concerned?”

“Mr. MacGillivray: So far as anyone is concerned? “Answer: Yes, sir.”

Do you remember that question and that answer?

A. Yes, sir.

Q. And that was true, wasn't it?

A. There is no statement in there that says about safety, Mr. MacGillivray.

Q. Pardon?

A. That statement, I don't believe, is the same as this one.

The Court: I think what the witness has in

(Testimony of LaVerne W. Prophet.)

mind is that your question had the word "warning" in it and the question there had "advise" and not "warning."

Mr. MacGillivray: I see.

The Court: Isn't that what you had in mind?

A. Yes, sir. [467]

The Court: All right.

Q. (By Mr. MacGillivray): Is it not true, Mr. Prophet, that over this 8 years of your experience, this loudspeaker system had been used to warn various individuals of the movement of cars?

A. To advise them, yes, sir.

Q. Yes. Do some yardmasters use that loudspeaker system more than others?

A. Yes, sir.

Q. Do some yardmasters disregard and not use the loudspeaker system at all?

A. There are a few, yes, sir.

Q. Now at any time before you turned these 14 cars loose on Old Main leading down to Track 13 and until you left for lunch, did you hear anyone advise over the loudspeaker system that floating cars were coming down in the dark on Track 13 in an easterly direction?

Mr. McKevitt: One moment. Object to that as incompetent, irrelevant and immaterial, and not being within the issues of this case. There is no allegation in this complaint or the amended complaint or the statement of the issues that that loudspeaker was there for the purpose of protecting Addison Miller employees.

(Testimony of LaVerne W. Prophet.)

The Court: There is a general allegation of failure to warn. [468]

Mr. Etter: Failure to warn.

Mr. McKevitt: That is all, your Honor.

The Court: I think that is sufficient. Overrule the objection.

Mr. MacGillivray: Read the question.

(The following question was read to the witness: "Now at any time before you turned these 14 cars loose on Old Main leading down to Track 13 and until you left for lunch, did you hear anyone advise over the loudspeaker system that floating cars were coming down in the dark on Track 13 in an easterly direction?") A. No, sir.

Q. Mr. Prophet, to your knowledge, is there a telephone communicating system between the west end of the Addison Miller dock and the yardmaster's office? A. Yes, sir.

Q. And that communicating system by telephone runs both ways? A. Yes, sir.

Q. Between the dock and the office?

A. Yes, sir.

Q. Do you know of your own knowledge, Mr. Prophet, whether or not any advice was given to the Addison Miller dock by that telephone communicating system of the intended drifting of 14 cars down Track 13 in an easterly [469] direction?

Mr. McKevitt: Same objection, your Honor.

The Court: Yes, all right. Overruled.

A. No, sir, not of my own knowledge, I don't.

Q. (By Mr. MacGillivray): Pardon?

(Testimony of LaVerne W. Prophet.)

A. Not of my own knowledge, no, sir.

Q. Mr. Prophet, is this a fact, that when you lined up No. 13 Switch, you saw no blue lights at the Addison Miller dock?

A. That is right.

Q. And that at least some 15 minutes later, for that reason, that you had seen no blue lights at the Addison Miller dock when lining up Switch 13, you turned these 14 cars loose?

A. The question again, please, sir?

Mr. MacGillivray: Will you read the question?

(The question was read.)

A. Yes, sir, because I figured I had protection with my field man there.

Q. And you what?

A. I figured I had protection with the field man.

Q. And at that same time, when you turned the 14 cars loose and when you lined 13 Switch, at neither of those times did you take into consideration the white lights on the top of the Addison Miller dock or the probability [470] that if those white lights were illuminated, men would be working on and about that dock. You didn't take that into consideration, or did you?

A. I don't remember whether I took that into consideration or not.

Q. Well, you were there, Mr. Prophet, and you are the one that lined the switch and turned the cars loose. Now did you take that into consideration?

A. I don't remember.

Mr. McKevitt: Cross examination, your Honor.

(Testimony of LaVerne W. Prophet.)

Mr. MacGillivray: Well, I think it is about time for it.

The Court: All right, you may continue.

Q. (By Mr. MacGillivray): Did you take that into consideration? A. I don't remember.

Q. Well, the fact is, Mr. Prophet, you didn't, isn't that true? A. Not necessarily so.

Q. Well, Mr. Prophet, did you at that time take into consideration that on quite a few times during the 8 years previous you had seen men actually working on cars at the Addison Miller dock with no blue light illuminated? A. No, sir.

Q. Mr. Prophet, you have worked out there since July 17, [471] 1952, continuously?

A. Yes, sir.

Q. I will ask you this, Mr. Prophet: Is the same system of advising Addison Miller employees, or not advising them, of the movement of cars into Tracks 12 or 13 at night when employees are working on the dock the same system as was employed prior to July 17th, or a different one?

Mr. Cashatt: Just a moment now. I object to that, your Honor. It calls for something after this accident.

The Court: I will sustain the objection. If counsel wishes to be heard, I will have the jury step out.

Mr. MacGillivray: We would, your Honor.

The Court: All right.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I tentatively ruled that I would sus-

(Testimony of LaVerne W. Prophet.)

tain the objection. It runs in my mind it is the general rule, at any rate, that changes made in methods of warning at grade crossings and such like places by railroad companies after an accident for the sake of safety are not admissible in evidence to show negligence in the former method of warning. Is that your position?

Mr. McKevitt: Absolutely. [472]

Mr. Cashatt: Further, your Honor, we have another phase in this case, that the defendant in this case is Northern Pacific and Addison Miller is in the picture.

Now whose change was it? Was it Addison Miller's change? Because if they had been negligent before, we can't help what they did afterwards, we have no control over Addison Miller. I can't see where in this case——

The Court: Well, I will hear you on this.

Mr. MacGillivray: Could you hear from my lawyer?

The Court: Yes, surely, either one.

Mr. Etter: Your Honor, the rule, of course, is as contended for on that score by counsel, but I think the rule, too, that proof of any changes or procedures after an accident, although it is not proof of negligence, may be offered, upon a proper qualification of the Court, to show that a safer method could have been used and was available.

Now in the case which your Honor heard in this Court several years ago, the same objection was made by Mr. Eckhart with regard to the erection of

(Testimony of LaVerne W. Prophet.)

a wire electric warning fence in Montana, and on the basis it could not be shown as evidence of negligence, but it could be shown there was a safer method feasible and available, the Court allowed its admission on that ground. And there are a number of cases that go to that rule that I have here, at least four of them. [473]

Mr. McKevitt: Was that an employer and employee relationship?

Mr. Etter: Yes, but that isn't the distinction. There is no distinguishing characteristic on the master and servant relationship; it is on the question of admissibility of showing a safer or more feasible way of operating and a more feasible procedure.

The question of negligence is absolutely out the window, we agree to that. It isn't proof of negligence and can't be.

Mr. McKevitt: We have no authority or power to direct Addison Miller what to do or what not to do out in those yards.

Mr. Etter: Well, then, the answer would be "no," wouldn't it?

The Court: What is it you propose to show here, Mr. MacGillivray, or Mr. Etter?

Mr. Etter: That there has been an adoption, at least, by the defendant company of new procedures as to warning about carrying things out on the track.

Now the evidence will show here, and it did from Mr. Cashatt's opening statement, that the Northern

(Testimony of LaVerne W. Prophet.)

Pacific owns all of this ice dock. As I understood his statement, they own the ice dock and they own all the appurtenances to the dock and they exercise dominion over the property except [474] to the extent of a lease arrangement with Addison Miller. We are asking them to show whether or not they haven't got new measures up there as to dumping this ice and as to going on this track since this accident.

Mr. McKevitt: What the relationship is between the Northern Pacific Railway Company and Addison Miller can best be shown by the contract between them, which they have pled in their complaint and we are willing to introduce in evidence. If you want to be sure on that score, we will give you the contract and let you prove what the relationship is.

Mr. MacGillivray: For fear of having any error in the record, and having great respect for Mr. McKevitt's legal ability, the question will be withdrawn.

The Court: All right.

Mr. McKevitt: I thought probably you would have that respect for his Honor's judicial rulings.

The Court: I don't know whether this would be within the scope of your examination here, I should think if their witnesses are on in their case, it might be a proper subject of cross-examination generally as to whether safer methods couldn't be used.

Mr. MacGillivray: That is my thought.

The Court: Without tying it to what has been done since the accident. [475]

(Testimony of LaVerne W. Prophet.)

Mr. MacGillivray: I think we will get to it before we are through.

The Court: All right, bring in the jury.

(Whereupon, the following proceedings were had in the presence of the jury.)

The Court: Proceed, then.

Mr. MacGillivray: You may examine.

Mr. Cashatt: I hate to have to bring the map out again, your Honor, but I do need it.

The Court: All right.

Cross Examination

Q. (By Mr. Cashatt): Mr. Prophet, will you please step down in front of the map, sir? We won't go back through the entire time that you picked these cars up at 43, but when you did pick the cars up, how many men were there in the entire crew?

A. The entire crew, there was the engineer, the fireman, the boiler snake or the pin puller and the field man and myself, making a total of five.

Q. And is that what you call your field men?

A. The field man is the long man or the one that generally throws the switches and keeps your cars lined for [476] tracks, any number of tracks, or any given track that you give him.

Q. Who was your field man on the night of July 17, 1952, when you made this move from Track 43 to Track 13? A. Bud Craig.

Q. Now when you lined the switch, Switch No. 13, did you look at the icing dock at that time?

A. Yes.

(Testimony of LaVerne W. Prophet.)

Q. Did you see a blue light on Track 13 at that time? A. No, sir.

Q. Did you see a blue light on Track 12 at that time? A. No, sir.

Q. Then after doing that, I believe you went on up towards the yard office, is that correct?

A. Yes, sir.

Q. Now did you leave anybody at Switch 13?

A. Not right at Switch 13, no, sir.

Q. Where did you leave anyone?

A. Mr. Craig was in the vicinity somewhere.

Q. Do you know how close he was to 13?

A. Not exactly, no, sir.

Q. And did he stay in the vicinity of Switch 13?

A. As far as I know, yes, sir.

Q. Was it his duty as a member of your crew to look for the blue light and to watch for the blue light while [477] this movement was taking place?

A. Yes, sir.

Q. Do you know if he did that?

A. Yes, sir.

Q. And how about Mr. Morton, did he stay in the location so that he could see the ice dock and see a blue light if it was on?

A. Mr. Morton was up in here, sir (indicating). It might have been he could have seen it.

Mr. McKevitt: A little louder.

A. Mr. Morton was up in this territory (indicating). He remained up there to keep lined for engine movement, and he could have seen or he could not have.

(Testimony of LaVerne W. Prophet.)

Mr. McKeivitt: Just a minute. Mr. Cashatt, the location isn't identified for the record.

Q. (By Mr. Cashatt): Well, you pointed up toward a location on Defendant's Exhibit No. 1 near the yard office, is that correct? A. Yes, sir.

Q. I believe that is all I need the map for. You can be seated.

Mr. Prophet, how did you get over from Track 43 to the switch at Track 13?

A. Walked over.

Q. In walking across there, could you see or did you see [478] the ice dock at any time while you were going over there?

A. I could see it all the time.

Q. Pardon?

A. You could see it at all times.

Q. Before you got to Switch 13, did you see any blue light on the ice dock on Track 13?

A. No blue light, no, sir.

Q. And just what does the blue light mean in relation to its use out there at the Addison Miller plant?

A. A blue light means that you will not couple on to, move, that car or string of cars that is protected by a blue light; you shall not move that blue light yourself; the only person authorized to move that blue light is the person that placed it there.

Q. In other words, when the blue light is on, it says "Don't move any cars on this track;" is that right? A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. Tell us about Track 13, what kind of a track is that?

A. Track 13 is just another trainyard track.

Q. And how many tracks are there in the yards, the Northern Pacific yards, at Parkwater?

A. 55.

Q. And do you know how many cars move in and out of that yard every month, approximately, an average? [479]

A. 50, 60,000.

Q. And that would be approximately 2,000, around there, a day?

A. Yes, sir.

Q. Mr. Prophet, besides the cars that come in and go out of the yard, how many times on an average do you switch a car after it gets in the yard?

A. Two to three, five times.

Q. From the time it comes in until the time it leaves?

A. Yes, sir.

Q. Now how many switch engines work in the yards on an average shift?

A. On an average shift at Parkwater, there are four engines.

Q. Four?

A. Four, yes, sir.

Q. Switch engines?

A. Yes, sir.

Q. How many shifts do they work at Parkwater, the railroad?

A. Work around the clock, three shifts around the clock.

Q. And who is the man on each shift that controls the yard, directs the movement of the cars, and so on?

A. The yardmaster.

Q. And where is the yardmaster located?

(Testimony of LaVerne W. Prophet.)

A. In the yardmaster's office. [480]

Q. Now at the time you went to pick up these 14 cars on Track 43, had you received instructions from the yardmaster to do that?

A. Yes, sir.

Q. And had you received instructions from him as to where to put the cars? A. Yes, sir.

Q. Do you happen to have the instruction sheet with you that you received from him that night?

A. Yes, sir.

The Clerk: Defendant's 25 for identification.

Q. Mr. Prophet, handing you Defendant's Exhibit No. 25 for identification, is that the switch list or the instruction sheet that you received from Yardmaster Crump for the picking up of these 14 cars on Track 43 and putting them in on Track 13?

A. Yes, sir.

Mr. Cashatt: Offer Exhibit No. 25.

The Court: Show it to counsel first.

Mr. Etter: These are the cars you moved in?

A. Those are the cars that I got off of Track 43, put on Track 13.

Mr. MacGillivray: Might I ask him some questions? [481]

Voir Dire Examination

Q. (By Mr. MacGillivray): Mr. Prophet, the figures on the left-hand side of this sheet, are these the numbers of the cars that you moved in?

A. Yes, sir.

Q. Do you remember which was the most east-

(Testimony of LaVerne W. Prophet.)

erly car or the lead car as they drifted down Track 13? A. Yes, sir.

Q. Which number?

A. This one right here, sir (indicating).

Q. No. 77346? A. Yes, sir.

Q. Then in the fourth column on the card here is the numeral in red pencil "13." What does that mean?

A. That designates the track on which the cars are going.

Q. Then in the column next to that in black pencil there is the numeral "4." What does that mean?

A. That stands for the destination of the car. They use numbers for destination.

Q. Well, would you explain that a little more?

A. Well, the best way I can explain it, Mr. MacGillivray, is that an 18 spot, which I happen to know, is Pasco; a 4 spot is somewhere east, I just don't know exactly.

Q. That is the destination of the car? [482]

A. Yes, sir.

Q. Then over in the last column is written the word— A. "Reduce."

Q. What does that mean?

A. That means that they are reducing tonnage from a train.

Mr. MacGillivray: No objection to 25.

The Court: It will be admitted.

(Testimony of LaVerne W. Prophet.)

(Whereupon, the said switch list was admitted in evidence as Defendant's Exhibit No. 25.)

Q. (By Mr. Cashatt): In the operation of the yard, Mr. Prophet, does the yardmaster have at his finger tips or on his desk knowledge of where the various cars are located throughout the yard?

A. Yes, sir.

Mr. MacGillivray: Objected to as improper cross-examination. This would be a part of their case in chief.

The Court: What was that last question?

(The question was read.)

The Court: The question is whether it is within the scope of the direct examination?

Mr. MacGillivray: Yes, your Honor. [483]

The Court: I rather doubt that it is.

Mr. Cashatt: It may not be within the scope of the direct. I will withdraw it. Possibly it is more in our case.

The Court: If you wanted to exhaust this witness and make him your witness, I don't think there would be much objection to that.

Mr. Cashatt: Well, I would rather, your Honor, have him return in our case.

The Court: I see, all right.

Mr. Cashatt: Just two or three further questions.

Q. Mr. Prophet, counsel asked you several questions in regard to the lights at the ice dock when you were at Switch 13. When you were standing

(Testimony of LaVerne W. Prophet.)

at Switch 13, the fact that the lights may have been on at the ice dock at the Addison Miller ice dock, did that in any way indicate to you that anyone would be on the ground and crawling under the couplers of two cattle cars on Track 13?

A. No, sir.

Q. Have you seen times, Mr. Prophet, when you are working in the yard there when all of the lights were on on the Addison Miller dock and no one was working on the dock?

A. Yes, sir.

Q. Seen that on many occasions? [484]

A. Not too many, but some, yes, sir.

Q. In other words, if the lights were on the dock on the night of July 17, '52, at the time you were at Switch 13, did that have any significance to you at all?

A. No, sir.

Q. Now this loudspeaker system, Mr. Prophet, there is no connection between that loudspeaker system in the N. P. yard office and the Addison Miller dock, is there?

A. Not that I know of.

Q. And that loudspeaker system is used by the yardmaster to instruct the switchmen, is that right?

A. To the best of my knowledge, yes, sir.

Q. Now counsel asked you if you knew if there was a phone between the N. P. yard office and the Addison Miller dock, and I believe you stated yes, did you?

A. Yes, sir.

Q. Did you know at that time, Mr. Prophet, if it was the custom of Addison Miller to call the Northern Pacific yard office and tell them if they had anyone working on or about cars?

(Testimony of LaVerne W. Prophet.)

A. Yes, sir.

Q. It was their custom, was it?

A. Yes, sir.

Q. And on July 17, 1952, did you receive any information through the yardmaster that Addison Miller, through the [485] foreman, had called and advised that any of their employees were on the ground under couplings or about cars?

A. No, sir.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Mr. Prophet, you say it was the custom for Addison Miller at all times to call on the telephone system to the yard office and tell them when anyone was working on the dock or on any icing operations?

A. That is the understanding we have, yes, sir.

Q. Did you have that understanding on July 17, 1952?

A. I don't remember just when it was when that came to light.

Q. Well, that understanding has arisen since the accident to Gerry Stintzi on July 17, '52, hasn't it?

A. I couldn't say.

Q. As a matter of fact, the system has arisen since July 17, 1952, that either by call on the telephone or by use of the loudspeaker system, Addison Miller is advised by the yardmaster of the movement of cars on either Tracks 12 or 13, isn't that correct?

A. Not to my knowledge. [486]

(Testimony of LaVerne W. Prophet.)

Mr. Cashatt: Just a minute. Same objection as to being after the time, your Honor. I confined my questions to July 17, 1952.

The Court: I think that is proper redirect.
Overruled.

Mr. McKeivitt: Of course, I have in mind, your Honor, that Mr. MacGillivray, on his examination of this witness, asked if a telephone was there and whether it had been used on that particular evening.

The Court: Now the question is whether it was used in this particular way only after the accident. He seems to indicate—I don't know whether he said or not. Has he said whether it was after?

Mr. Etter: He said he didn't know.

Mr. MacGillivray: He said he didn't know. I am trying to find out.

The Court: All right, go ahead.

Mr. MacGillivray: Read the question back.

(The question and answer were read.)

Q. (By Mr. MacGillivray): Would you say that that is not the fact, or is it that you don't know?

A. I don't know that they call Addison Miller.

Q. Now you say, Mr. Prophet, that you have seen lights on the top of the Addison Miller dock at night and no one was working? [487]

A. Yes, sir.

Q. And you said that you had seen that but not on very many occasions? A. Yes, sir.

Q. And you are speaking of your eight years experience prior to July 17, '52?

(Testimony of LaVerne W. Prophet.)

A. Yes, sir.

Q. With the exception of this not many occasions, on all other occasions at night when the lights were illuminated, employees were working on and about that dock; is that not correct?

A. No, sir.

Q. Pardon? A. No, sir.

Q. What is the fact?

A. I have seen them standing around just talking, sir, where there was no one working. They would be standing in a group, just standing there talking.

Q. Well, they would be present on and about the dock, whether actually engaged in manual labor or taking a rest? A. Yes, sir.

Q. Yes. So that when white lights are lit on the top of that dock at night, it is not only a probability, from your experience, it is almost a certainty that men are [488] on or about that dock; isn't that correct?

Mr. McKevitt: Objected to, if your Honor please, as being repetition, cross-examination.

Mr. MacGillivray: He is going a little further.

The Court: Well, I think it is going into repetition, but I will let him answer this question.

A. Question, please, sir?

Mr. MacGillivray: Would you read it back, please?

(The question was read.)

A. Almost.

(Testimony of LaVerne W. Prophet.)

Mr. McKevitt: Objected to on the further ground it is calling for the conclusion of the witness.

The Court: Overruled.

A. Almost.

Q. (By Mr. MacGillivray): Pardon?

A. Almost.

Q. Almost? You mean almost a certainty?

A. Almost a certainty.

Q. Yes. Then you talk about the blue light, Mr. Prophet. Is that some rule adopted by the railroad?

A. That was in the book of rules when I hired out.

Q. And that is the one rule you had in mind when you turned these 14 cars loose the night of July 17th, the blue light rule?

A. I don't quite understand you, sir. [489]

Q. Did you have in mind any other railroad rule when you turned those cars loose that night?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial. There is no allegation of a rule violation in the pleadings or statement of issues.

Mr. Etter: There doesn't have to be an evidentiary allegation of a rule violation.

The Court: I will overrule the objection.

Mr. MacGillivray: Read the question back.

(The question was read.)

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Did you have in mind at that time Rule 805 of the Consolidated Code, reading as follows——

(Testimony of LaVerne W. Prophet.)

Mr. McKevitt: Your Honor, I am going to object to this, of going into this Consolidated Code of Operating Rules. There is nothing in the pleadings here to indicate in any manner that this man was injured by virtue of the violation of a rule enacted for his protection.

Mr. Etter: Failure to warn is alleged in three separate allegations in different fashion.

The Court: Well, does this rule have to do with warning?

Mr. Etter: Certainly it has to do with warning. [490]

Mr. Cashatt: Your Honor, but the employee here was an Addison Miller employee.

Mr. Etter: Yes, but this rule has to do with warning anyone. Anyone.

Mr. MacGillivray: Let's read the rule and then make the objection.

Mr. McKevitt: Well, if you read the rule, why then——

Mr. MacGillivray: May I hand the rule to your Honor?

The Court: Yes.

Mr. McKevitt: Let the Court read the rule.

Mr. MacGillivray: 805, marked there in pencil, your Honor.

(Document handed to Court.)

The Court: I will overrule the objection. The record may show the objection.

Q. (By Mr. MacGillivray): Mr. Prophet, at that time when you turned those cars loose drifting

(Testimony of LaVerne W. Prophet.)

down Track 13, did you have in mind this rule, being Rule 805 of the Consolidated Code, 1045 Edition, reading as follows:

“Before moving cars on engines in a street or on station or yard tracks, it must be known that they can be moved with safety.”

Did you have that in mind? [491]

A. In the back of my mind, yes, sir.

Q. Pardon?

A. Probably in the back of my mind, yes, sir. You can't hold 900 some in the front of your mind.

Q. Well, did you consciously have in mind that rule that night?

A. I don't know whether I had it consciously or not.

Mr. McKevitt: May it be understood I have a general objection?

The Court: Yes, the record may show a continuing objection.

Q. (By Mr. MacGillivray): Mr. Prophet, did you have in mind that night this section of Rule 805:

“Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone.”

Mr. McKevitt: Same objection.

Q. (By Mr. MacGillivray): Did you have that rule in mind?

Mr. McKevitt: Same objection.

(Testimony of LaVerne W. Prophet.)

The Court: All right, overruled.

Q. (By Mr. MacGillivray): Did you have that rule in mind consciously that night?

A. I didn't know that those cars were being loaded or we [492] would——

Q. You didn't know they weren't?

A. That they were being loaded or unloaded.

Q. And you didn't know that they were not being loaded or unloaded, did you?

A. No, sir.

Q. Then, Mr. Prophet, in referring to the sketch here, Mr. Cashatt asked you a question about whether your man Craig was left at Switch 13, and I believe your answer was no and you said he was left over in this vicinity (indicating). Were you pointing to the vicinity of Track 43?

A. No, sir.

Q. Where was Craig?

A. To the best of my knowledge, sir, he was up around another switch that isn't even shown on that chart at all.

Q. And how many yards from Switch 13?

A. I wouldn't know, sir.

Q. Well, approximately?

A. I don't know, sir, I never measured them.

Q. And that is one of the switches leading from Track 43 into the outbound? A. No, sir.

Q. Well, what switch, then? [493]

A. It is in the "hell hole," sir.

Q. One of the "hell hole" switches?

A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. That is quite some distance from Switch 13, is it not? A. Some distance.

Q. Yes. Then one more thing, Mr. Prophet: Did you make the statement, did I hear you correctly, that at the Yardley yards Track 13 is just another trainyard track? A. Yes, sir.

Q. Does that apply also to Track 12?

A. Yes, sir.

Q. In other words, Track 13 and Track 12 to you switchmen at the yard are no different than Track 1 or Track 2?

A. That is right, trains are made up on all tracks.

Q. Pardon.

A. Trains are made up or broke up on all 13 of those first tracks.

Q. Well, with reference to how you operate that yard, the operation is no different on Track 12 or 13 than it is on 1 or 2? A. No, sir.

Q. You take no more precautions on 13 or 12 than you do on 1 or two?

A. Only when there is a blue light.

Q. Well, you take the same precautions when there is a [494] blue light on 1 and 2, don't you?

A. Yes, sir.

Q. So that is the same on both tracks, isn't it?

A. Yes, sir.

Q. And you take no further precautions on 12 or 13 than you do on 1 or 2? A. No, sir.

Q. In other words, it doesn't enter and never

(Testimony of LaVerne W. Prophet.)

has entered into your considerations out there prior to July 17, 1952, did it?

A. Mr. MacGillivray, I still didn't—

Q. Now yes or no, Mr. Prophet?

A. Question, please.

Q. And then explain.

A. Question, please.

The Court: Read the question.

(The question was read.)

A. No, not prior to.

Mr. MacGillivray: That is all.

Recross Examination

Q. (By Mr. Cashatt): Mr. Prophet, who out there at that yard on July 17, 1952, what employee of the Northern Pacific had the duty of knowing what cars were on Track 13 when you were [495] instructed to put these others in?

A. The yardmaster.

Q. And from your work around there and your knowledge of the operation in that yard, does the yardmaster know before he gives you instructions as to what cars are on that track? A. Yes, sir.

Q. And were you relying on the instruction given you by the yardmaster when you put the 14 cars in on Track 13? A. Yes, sir.

Q. And, Mr. Prophet, under what circumstances have you seen a car or cars being iced by Addison Miller employees when the blue light was not on?

A. When a full train would come into the yard, would pull in on Track 12 or Track 13 there from

(Testimony of LaVerne W. Prophet.)

one end of the ice dock to the other; there will be sometimes too many cars for the track, other times there aren't. A fruit train will consist of anywhere from 55 to 100 cars. 100 cars, those rails will not hold, so you cut them and push them in on the other track. I have seen that where they didn't use a blue flag on that occasion because you knew they were there. You heard them come into the yard, you seen them come into the yard, and everyone knows that they are there, something that you just know, and you take your work, you never see where [496] you will get a list to kick cars in on those tracks when there is a fruit train being iced there. The yardmaster gives you your dope and he generally keeps you away from those tracks.

Q. And have you ever seen any Addison Miller men, during the time you have been out there, icing cars when the blue light wasn't on under any other circumstances than what you have just told us?

A. Not to my knowledge.

Q. In all your experience out there, Mr. Prophet, did you ever see any Addison Miller men carrying slush ice out under the couplings of cars standing on Track 13? A. No, sir.

Mr. Cashatt: That is all.

The Court: Any further questions?

Mr. MacGillivray: One question.

Redirect Examination

Q. (By Mr. MacGillivray): Mr. Prophet, when I took your deposition on June 18th and asked you

(Testimony of LaVerne W. Prophet.)

about seeing men icing cars without the blue lights illuminated, you didn't give me this long explanation, did you? A. No, sir.

Q. Do you recall the question I asked you and the answer [497] you gave at that time?

A. Yes, sir.

Mr. McKevitt: What page is that, Mr. MacGillivray?

Mr. MacGillivray: Page 32.

Mr. Cashatt: Your Honor, I object to this as not proper redirect here. The witness was questioned in the same fashion as he was there. He wasn't asked to explain it, and all I did was go back and ask him to explain it.

The Court: All right, overruled.

Q. (By Mr. MacGillivray): Mr. Prophet, you remember my asking this question, this going on, and your giving these answers:

“Question: All right, during your eight years experience, had you ever seen men icing cars of the Addison Miller dock at night without the blue light illuminated?”

“Mr. Kevitt: Do you understand that question? Have you ever seen men icing refrigerator cars when there wasn't a blue light to warn the switching crew?”

“Answer: Yes, sir, I have.”

You remember that?

A. Yes, sir. [498]

Q. (Continuing):

“Question: On how many occasions?”

(Testimony of LaVerne W. Prophet.)

“Answer: I don’t know the exact figure but quite a few times.”

Do you remember that?

A. Yes, sir.

Q. (Continuing):

“Question: And that also is over this period of eight years?”

“Answer: Yes, sir.”

You recall that?

A. Yes, sir.

Mr. MacGillivray: That is all.

Recross Examination

Q. (By Mr. Cashatt): Mr. Prophet, if Mr. MacGillivray had asked you at that time under what circumstances you had seen this occur, would your answer have been just the same as you gave here in court today?

A. I believe it would have, sir.

The Court: Any other questions of this witness?

Mr. MacGillivray: That is all.

(Witness excused.)

The Court: Court will recess, then for 10 minutes. [499]

(Whereupon, a recess was taken, during which the following proceedings were had in chambers, all counsel being present:)

Mr. McKevitt: I wanted to discuss briefly with your Honor and counsel this reference to Rule 805 that Mr. MacGillivray read. He only read a portion of that rule and we desire to know at this time if

he is offering that rule in evidence. If he is, he should offer the entire rule, because it is our position, if your Honor pleases, that an analysis of that rule would show that it has no application to Addison Miller employees, and particularly one who was engaged in the activity of Stintzi, because if we were bound to comply with the rule or that portion of the rule that Mr. MacGillivray called attention to, it would require a switchman to go down there, irrespective of whether there were 10 cars on that track or 50 or 60, to examine that whole train from one end to the other to see whether or not fellows are crawling underneath couplers and emptying ice.

There is no contention made in the pleadings at all that we have violated any rule and this comes as a complete surprise to us.

I don't think it is fair to the defendant to have counsel just refer to one or two sentences of one paragraph of a rule that contains any number of provisions, and the [500] portion of the rule that he refers to could only have been called to the witness' attention for the purpose of showing that that rule was for the benefit of this young man at that time, and, in order to establish that fact, the rule in its entirety should go into the record.

Mr. MacGillivray: The examination was this: The witness testified that he had in mind at the time he turned these cars loose the blue light rule, of course, upon which the defendant relies in this case. The examination, which I think was proper of the witness, was as to whether or not he had two sec-

tions of Rule 805 in mind at that same time, and that is as far as the examination went.

Mr. McKevitt: Wasn't it your intention to convince the Court and jury that this rule was enacted for the benefit and for the protection of Addison Miller employees generally, and this boy in particular, at the time he was doing what he did do?

Mr. Etter: I will say yes, that is the intention, and I am certain it is embodied in the rule itself, because the rule provides that before moving cars or engines in a street or on a station or yard track. Now when it refers to "anyone," it refers to anyone under any circumstances, during any switching movement, whether it is in your yard, your station or a street. I think it is clear.

Mr. McKevitt: Of course, that makes us an insurer [501] of everybody in that yard.

Mr. Etter: It doesn't make you an insurer at all. As a matter of fact, I think that the blue light rule is no positive rule of protection; that they are still required by the railroad to exercise due and reasonable care; and the jury has a right to determine what is due and reasonable care under all rules that may be applicable to that particular switching movement. That is a question of fact for them.

Mr. McKevitt: Well, our position is, your Honor, that if they are relying on any provision of that rule, that the rule in its entirety should go in.

I don't want to be put in the position of offering the rule and then have them say we waived our objection to it. In fairness, they ought to do it.

Mr. Etter: You can put in any other section of

the rule you desire, but I don't think there is any proscription to our taking any particular section that may have application to this situation and asking the man if he knows anything about that. If there are other sections that are applicable, I think you have a right to introduce them.

Mr. McKevitt: I don't think any section is applicable.

Mr. Etter: There is no railroad court here that says they aren't. That is your position; we can take the opposite. [502] Where have you got any interpretation that says your interpretation applies?

Mr. McKevitt: I have had plenty. I had this same question come up down before Judge Clark in Moscow in October.

Mr. Etter: You had one on a rule that was non-existent.

Mr. McKevitt: Mr. Etter, you weren't there, you don't know what I am talking about.

Mr. Cashatt: As I see it, your Honor, the way it is in the case now, no matter what a man is doing, if he is crawling between cars, and so on, the rule is not applicable to the situation here. There is no evidence he was unloading or doing anything of that type; the only undisputed evidence is that he was crawling under the couplers.

The Court: Well, here is the position it puts the Court in: This witness says that he is relying on the blue light rule, and it seemed to me proper cross-examination to call to his attention other rules that appeared on their face to be applicable, general language in there as to moving cars and when

it doesn't appear that it is safe to do so. Of course, if there are other parts of the rule or other rules that are applicable, I should think that it would be the duty of the defendant to put them in. If they refer to a part of a rule, then, of course, that opens the door, you [503] can put the whole rule in if you wish to offer it.

Mr. McKevitt: Well, we would be offering the entire rule for the purpose of showing that the rule and the portion they refer to has no application to the situation at hand.

Mr. MacGillivray: I believe the rule must be given a common sense application. I don't follow Mr. McKevitt's argument. I think it would be applied this way: That if a switchman engaged in the movement of cars has reason to believe that someone might be endangered by the movement of the cars, then a duty arises upon him. However, if under the circumstances it appears that he did not, as a reasonable man, have any reason to believe that anyone would be endangered, then the rule wouldn't be applicable.

Mr. Etter: That is a matter of argument, isn't it?

The Court: I think it is a matter for instruction and argument. I don't propose to instruct any jury that the railroad company is an insurer of Addison Miller employees or that they were bound to know that somebody was going under the cars, but that is a matter for instruction when the proper time comes, I should think, to limit the application of the rule, if it is to be submitted to the jury at all. Of course,

so far you haven't got anything in the record. It seems to me that the witness indicated he wasn't familiar with the rule, didn't he?

Mr. McKevitt: No, he was just asked if he had that [504] rule in mind; he wasn't asked if he was familiar with it. He said "Did you have this rule in mind."

The Court: Yes.

Mr. McKevitt: That is what he asked him.

Mr. Etter: Well, he didn't answer that he didn't know the rule at all, never heard of it.

The Court: No, I assumed that there was no question about its being in the rule book and part of the rules.

Mr. McKevitt: Well, I can't think of any reason for the question being put, despite the clever way in which it was put, except to convey to the jury the impression that we had violated some rule that was enacted for the benefit of Stintzi. Now they can't say that wasn't their purpose.

Mr. MacGillivray: Well, and maybe you did.

Mr. Etter: That's right.

Mr. McKevitt: Maybe we did what?

Mr. MacGillivray: Violate a rule.

Mr. McKevitt: Well, then, put the whole rule in.

Mr. MacGillivray: We will get around to that.

Mr. Etter: You can put it in.

Mr. McKevitt: I will leave that up to the chief counsel here, my colleague, as to what he wants to do. I know what I would do with it under certain circumstances.

The Court: Well, I think so far there has only

been cross-examination on the part of the rule. The rule isn't [505] in evidence.

Mr. MacGillivray: No, that's right.

The Court: Just simply a mention of it by way of cross-examination, so at this stage I don't think there is anything that is before the Court to instruct on any basis of liability or negligence.

Mr. Etter: The blue light rule isn't even in.

The Court: No, I don't think it is. There has been a lot of testimony about it.

Well, I think we will just have to go ahead and then make the decisions as the questions arise.

Mr. MacGillivray: We have got another problem I know your Honor has thought of, and that is getting through with this lawsuit.

The Court: In what?

Mr. MacGillivray: Getting through with this lawsuit.

The Court: Well, I have thought about that. I don't think we want to work the jury on the 4th of July if we can avoid it.

Mr. MacGillivray: No. Well, I had in mind that you had to go to San Francisco.

The Court: Well, I am supposed to go Saturday morning, but, of course, I could get there by leaving later, but I am afraid we wouldn't have a jury in a very good frame [506] of mind if we kept them here Saturday and perhaps into Sunday getting their verdict returned. And if we don't get through, of course, we would have to recess this over until about the middle of August before I can

take it up again, because I will be in San Francisco all during the month of July.

Mr. Etter: Could we work tonight?

Mr. Cashatt: Your Honor, with the amount of evidence that has gone in, it is going to take time even if we try to speed it up.

The Court: I know, it is just taking a long time, but I think we better run until 5.

Mr. MacGillivray: How about a little night work? I think we are all agreeable if the Court is.

The Court: Perhaps we should have a night session tomorrow night then if you are not getting along faster than you appear to be now. I think that would be preferable to trying to recess this now. The jury gets out and forgets all about the testimony, and that makes a miserable situation if you have to wait that long to finish a case.

Mr. McKevitt: Well, I don't know to whom it would be detrimental if we were penned up around the 4th of July. Take a guess on that one.

(Off-the-record discussion.) [507]

(Whereupon, the following proceedings were had in open court in the presence of the jury:)

Mr. Etter: Mr. Elsensohn.

JAMES ELSENSOHN

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you state your name, please?

A. James Elsensohn.

(Testimony of James Elsensohn.)

Q. Where do you live, Mr. Elsensohn?

A. I live here in town, 4605 North Addison.

Q. And you live there with your family?

A. Yes, sir.

Q. Of what does your family consist?

A. My wife, a daughter who has just left home for Washington, D. C., and a son.

Q. A son who is home with you?

A. At home now.

Q. How long, Mr. Elsensohn, have you resided here in Spokane? A. Since 1933.

Q. Since 1933? [508]

A. And 4 years previously, out in the Valley.

Q. You refer to the Spokane Valley?

A. Yes, sir.

Q. What is your present occupation, Mr. Elsensohn?

A. I am a teacher at John Rogers High School.

Q. In addition to your duties as a teacher, do you perform any other services?

A. I have been an athletic coach most of the time. I am not currently an athletic coach, however.

Q. You are not currently in athletics as a coach?

A. That's right.

Q. Directing your attention to 1951 and '52 or thereabouts, were you then engaged in athletic coaching activities?

A. I was coaching track at that time.

Q. You were track coach at John Rogers High School? A. Yes, sir.

(Testimony of James Elsensohn.)

Q. And how long have you been engaged in athletic work as a coach?

A. I took my first job as athletic coach at Central Valley High School in 1929.

Q. And were you continuously, then, engaged in coaching work up until you ceased a few years ago?

A. Except for a few years while I was in the Navy.

Q. You were in the naval service?

A. Yes, sir. [509]

Q. And other than that time, you have been actively engaged in athletics?

A. Until two years ago.

Q. Has your coaching extended beyond track, or have you had some other sports?

A. Sir, I have coached all sports except baseball.

Q. Except baseball? A. Except baseball.

Q. Do you know Gerry Stintzi, Mr. Elsensohn?

A. Yes, sir, I have known Gerry Stintzi since about 1950.

Q. Since about 1950. And when you first met or knew Gerry, where was he in school?

A. Yes, sir, he was a student at Hamilton Grade School, I believe.

Q. At the Hamilton Grade School?

A. Yes, sir.

Q. And how was it that you had occasion to meet him then?

A. Well, I found him turning out for track up on our Rogers High School track. He had his own track shoes and just for his own interest and be-

(Testimony of James Elsensohn.)

cause he liked the sport, was turning out, and I questioned him about why he was up there at that time.

Q. And that was when he was still a grade schooler? A. Yes, that's right.

Q. And, I gather, he was turning out with your track team [510] up there, working out with them?

A. Yes, then and afterward.

Q. Then and afterward. Did he later enter John Rogers High School as a freshman?

A. Yes, sir, he did, the fall of 1950.

Q. And did he turn out for the track team at Rogers?

A. Yes, he turned out for both cross-country in the fall and track in the spring, and he also participated in football.

Q. Have you had occasion, Mr. Elsensohn, during the years in which you have coached athletics, placing particular emphasis now on the track part of athletics, have you coached a considerable number of youngsters who were trackmen, that is, who ran the same distances as Gerry?

A. Yes, I have.

Q. And his distance was the mile, principally?

A. That's right, although I think there are a number of events he could have participated in and done very well.

Q. Very well. But you have coached a number of youngsters in track during your time?

A. Yes, I have.

Q. And could you state what your opinion is

(Testimony of James Elsensohn.)

with respect to Gerry's ability as a trackman when you first came to know him in the 8th grade and as a freshman at Rogers [511] High School?

A. Well, he made quite an outstanding impression on me when he was still in the 8th grade for the reason that he was able to do almost as well or as well as some of my varsity boys who were juniors and seniors in high school. And so I, of course, had my eye on him when he came to Rogers and, as far as I knew, he is the only freshman who ever made his letter as a freshman in the distances at Rogers.

Q. At Rogers?

A. At Rogers. It is a very rare thing, and Gerry made it, as I recall, in cross-country that year he entered as a freshman, and, of course, he did very well as a freshman in the spring in track.

Normally, we do not allow freshmen to participate with the varsity because they have their own league. Once in awhile a boy comes along that, because of ability or because of maturity, for some other reason, we think should be with the varsity. He was one of those few and rare instances.

Q. Mr. Elsensohn, having in mind your experience in coaching high school track athletes, your knowledge of Gerry Stintzi and working with him as a trackman and as a freshman at Rogers High School, could you give us an opinion as to his prospects for future track work by [512] comparison with other individuals and youngsters that you have coached during your athletic career?

(Testimony of James Elsensohn.)

A. It is always difficult to predict an athlete's future, but on the basis of what he did as a freshman and sophomore, I thought that he had an outstanding future.

Q. An outstanding future.

Mr. Etter: That is all.

Mr. Cashatt: No questions, sir, that is all.

(Witness excused.)

Mr. Etter: Mr. Hagin, will you come forward, please?

WALLY HAGIN

called and sworn as a witness on behalf of the the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you state your name, please?
A. My name is Wally Hagin.

Q. Where do you reside, Mr. Hagin?

A. North 1229 North Division.

Q. How long have you resided there?

A. About six months at that particular address.

Q. How long have you been a resident here in Spokane?
A. Since 1918.

Q. Since 1918. What is your present occupation, Mr. Hagin? [513]

A. I am a photographer.

Q. And how long have you been a photographer?

A. Since 1948.

Q. Since 1948?
A. Right.

Q. And what type of work do you do as a photographer, Mr. Hagin?

(Testimony of Wally Hagin.)

A. I do both portrait and commercial.

Q. You do both portrait and commercial work?

A. Yes, sir.

Q. That is, of all types? A. That's right.

Q. Do you do all of the various acts and services that are performed with photography other than merely taking pictures? A. I do.

Q. You do. And you have been doing that for how long? A. Since 1948.

Q. And in your work, have you done likewise various colors, brown and white—black and white—and Kodachrome or colored work?

A. I have.

Q. Is that correct? A. That is correct.

Q. And have done that for a number of years?

A. That's right.

Q. And are presently engaged in that work?

A. Correct.

Q. Mr. Hagin, are you acquainted with Gerry Stintzi who is seated here? A. Yes, sir.

Q. And did you have occasion to see him possibly two weeks ago?

A. That's right, I did, I took pictures of him, of his condition, after his accident.

The Clerk: Your Honor, I have marked Plaintiff's 26 through 33 for identification.

Q. (By Mr. Etter): These photographs that you took, Mr. Hagin, do you recall, can you tell us the date that you took them?

A. It was June 10th, 2 p.m.

Q. June 10th at 2 p.m., of what year?

(Testimony of Wally Hagin.)

A. 1954.

Q. 1954. And after you took these pictures, what did you do with the negatives?

A. After processing them, I gave them to you.

Q. After processing them, you delivered them to me, is that correct? A. Correct.

Q. Without telling us anything about what appears in the [515] negative, I am handing you Plaintiff's Exhibit 26 and asking you if you recognize that? Just a yes or no? A. Yes.

Q. I will ask you if that is one of the pictures that you took on June the 10th at about 2 o'clock of the year 1954? A. That is correct.

Q. Of Gerry Stintzi? A. Yes.

Q. Handing you at this time Plaintiff's Exhibit No. 27, will you examine that and tell me whether or not you recognize what it represents?

A. Yes, I do.

Q. And did you take that picture on or about June 10th? A. It took it on that date.

Q. Of Gerry Stintzi? A. Correct.

Q. Handing you Plaintiff's Exhibit 28, I will put these right in front of you Mr. Hagin—

A. All right.

Q. —28, 29, 30, 31, 32 and 33 for identification, and ask you to examine all of them and tell me what they are without going into an explanation of what they represent.

A. Those are all pictures I took of Gerry Stintzi. [516]

Q. On June 10th? A. June 10th.

(Testimony of Wally Hagin.)

Q. I will ask you whether or not these pictures—how are they taken, in what shade?

A. Well, they are taken in their natural colors, just the conditions as they were at that particular time.

Q. At that particular time. Can you tell me whether or not these are accurate representations of Gerry Stintzi and the particular areas that are depicted by the pictures?

A. They are exactly as the conditions were at that time.

Q. And you saw him at that time, of course?

A. Yes, I did.

Q. And have examined these since?

A. Yes, I have.

Q. And are they such accurate representations of that condition? A. Exactly.

Q. They are. Likewise, Mr. Hagin, do you handle projection work? A. I do.

Q. And how long have you handled that type of work?

A. About the same period, since 1948.

Q. Can you tell me whether or not these exhibits for identification, being Plaintiff's 27 to 33, inclusive— [517]

Mr. McKevitt: 26, is it not?

The Clerk: 26.

The Court: 26 to 33.

Mr. Etter: 26 to 33, yes.

Q. Can you tell me whether or not by projection, Mr. Hagin, these slides or exhibits or rather

(Testimony of Wally Hagin.)

identifications, can you tell me, do they accurately reproduce as to the situation and condition which you photographed and which is shown by those exhibits? A. They will.

Q. When projected on a screen?

A. Correct.

Mr. Etter: That is all, Mr. Hagin.

(Witness excused.)

Mr. MacGillivray: Dr. Valentine.

HOWARD V. VALENTINE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your full name, Dr. Valentine?

A. Howard V. Valentine.

Q. And you are a physician and surgeon?

A. That is correct. [518]

Q. Practicing here in Spokane?

A. Yes.

Q. With offices in the Old National Bank Building? A. Yes.

Q. You office with Dr. Tousey and——

A. Jacobson.

Q. Pardon? A. Jacobson.

Q. And how long have you been admitted to practice in the State of Washington?

Mr. McKevitt: We will admit the doctor's general qualifications.

(Testimony of Howard V. Valentine.)

Mr. MacGillivray: Fine.

Q. Doctor, you know young Gerry Stintzi?

A. Yes, I do.

Q. Did you have occasion to treat him as a patient?

A. I did.

Q. When did you first see Gerry?

A. I first saw him the evening of his injury, shortly thereafter. I saw him the evening of his injury shortly after his injury. I first saw him at the Sacred Heart Hospital.

Q. July 17, 1952? A. That is correct.

Q. Do you have any records, Doctor, that you can refer to [519] as we go along?

A. Yes, I have.

Q. It might hurry things up. What time on July 17th did you see him?

A. At approximately 9 p.m.

Q. And where did you see him?

A. I saw him first at Sacred Heart Hospital.

Q. In what room there?

A. I was called by phone informing me that this man was seriously injured with a serious leg injury. I had instructed the hospital to admit him directly to the surgery, so I saw him in surgery.

Q. And would you tell the jury here, Doctor, and speak up, just what his condition was when you first saw him?

A. The boy was in profound shock as a result of his injuries. He was practically pulseless, he was in a cold, clammy, shocked condition. He was semi-conscious and obviously had lost a considerable

(Testimony of Howard V. Valentine.)

amount of blood. He had numerous obvious injuries, including a traumatic amputation of the right leg in the thigh region near the hip. He also had a fracture of the left thigh bone; he had both bones of the right forearm compound fracture.

Q. What is a compound fracture?

A. Meaning where the skin over the region of the bones has [520] been disrupted, the region of the fracture.

Q. The bone sticking through the skin?

A. The bones were not actually sticking through the skin, but the skin soft tissues over the site of fracture were disrupted.

Q. What about the fracture of the left leg?

A. The fracture of the left leg was near the junction of the middle and upper thirds and was a complete fracture.

Q. Was that a compound or comminuted fracture?

A. That was a comminuted but not compound fracture.

Q. What does "comminuted" mean?

A. Comminuted means that there are more than two fractures and the fracture lines extend to make at least three fracture lines.

Q. Then was the right leg still attached at the hip, or just describe it briefly, what the situation was?

A. The right leg, which had been the most seriously injured, was attached only by a thin margin of skin to the hip. The tissues were obviously con-

(Testimony of Howard V. Valentine.)

siderably crushed and macerated. There was considerable amount of dirt and gravel ground into the wound. There was a loss of skin over the lower right abdomen, extending above the hip, and the wounds extended into the rectum, posteriorly, and the scrotum, anteriorly. [521]

Q. What other conditions did you find?

A. The wound extending into the scrotum had produced a rupture of the urethra.

Q. And what else in that region?

A. Pardon me?

Q. What other condition was there in that region?

A. And produced also an opening up of the scrotum, with consequent evulsion of the right testicle.

Q. Were there any internal injuries?

A. The internal injuries consisted primarily of the injury to the bladder outlet, outlet of the bladder, and a fracture involving the right pelvic bone and, of course, considerable contusions and abrasions about the abdomen and, consequently, probably some internal hemorrhage.

Q. Was the bladder ruptured?

A. Beg your pardon?

Q. Was the bladder ruptured?

A. At its outlet.

Q. I see. Then, Doctor, will you just go ahead and tell us all about his condition and what you did that first or second day?

A. Well, on the day, on the evening of admis-

(Testimony of Howard V. Valentine.)

sion, the first treatment, obviously, was to relieve his pain and overcome the shock. This was done by giving the boy [522] morphine for his pain and immediate plasma for his shock, obtaining blood as rapidly as possible, typing him and obtaining the blood. This was all done while he was still on a stretcher in the operating room, because his condition did not permit further treatment until the shock had been combatted.

He was given several infusions of plasma, followed by several pints of blood, and when his general condition permitted it, he then was moved to the operating table where he was anesthetized and a re-amputation of the right thigh was conducted at a site perhaps four inches above the site of the traumatic amputation. There was not sufficient skin to cover this area, so this was a so-called guillotine operation.

Q. What do you mean by a guillotine re-amputation?

A. That means without an attempt to close the soft tissues over the remaining bone. The soft tissues were simply divided and the bone divided at a region about four inches above the original site of injury and the devitalized tissue of the wound was removed. The lacerations extending into the rectum and scrotum were repaired; a pin was placed through the left leg below the knee for traction for the fracture of the left femur; the right forearm fractures were manipulated and a plaster cast applied; and the bladder was opened, [523]

(Testimony of Howard V. Valentine.)

a drain placed from the bladder through the urethra to the outside, and a drain placed also from the bladder directly upward to provide adequate bladder drainage. The right stump was dressed with pressure, and the patient then was removed to a room.

Q. Now Doctor, from your experience, you have seen a lot of traumatic cases, I take it?

A. Yes.

Q. From your experience, what would you say as to the extent of Stintzi's injuries as to other cases you have seen?

Mr. McKevitt: That is objected to on the ground of comparison with other injuries.

The Court: Yes, I will sustain the objection.

Mr. McKevitt: Your Honor ruled on a similar question.

The Court: I will sustain the objection. I think it should be described without comparisons.

Q. (By Mr. MacGillivray): What opinion did you have that night as to the extent of his injuries and the seriousness of them?

A. They were very extensive injuries and, of course, at first considered very critical.

Q. Did you at that time despair of his life?

A. Well, I think anyone would with a similar situation. [524]

Q. I see. Then when did he regain consciousness after this operative procedure, do you know?

A. Well, I couldn't be too exact in that, but I would say that the following morning when I ex-

(Testimony of Howard V. Valentine.)

amined him he was conscious, had a level of consciousness which permitted him to answer questions.

Q. Then what was his condition for the next few days as to pain and suffering he went through?

A. Of course, he had considerable suffering. It was relieved insofar as we were able to do so and in our judgment judicious to do so. He remained in a critical condition for some days afterwards.

Q. Was he given opiates, sedatives?

A. He was given opiates at regular intervals.

Q. And did they relieve him complete of the pain and suffering? A. Not completely.

Q. Then when was your next operative procedure? Doctor, I have here a part of the hospital record. A. Oh.

Q. That might be of help to you.

A. If it runs chronologically, it may be some help.

(Document handed to witness.)

On the 23rd——

Q. Of July? [525] A. Of July.

Q. What was done on that date?

A. On that date pins were placed in the left thigh bone to initiate reduction of the fracture of the left bone which had previously just been treated by traction, and also the wound of the right thigh was redressed and he was given a blood transfusion.

Q. Then on July 28th, was he taken again to surgery?

A. On July 28th he was taken again to surgery, where the cast on the right forearm was removed,

(Testimony of Howard V. Valentine.)

the wounds were cleansed and the fractures of the forearm were again manipulated in an effort to obtain better reduction, and the fractures of the left thigh were again manipulated and placed in an external fixation apparatus.

Q. On that date, Doctor, was there a disarticulation of the right femur at the hip joint?

A. That is correct, on that date there was a disarticulation of the remaining stump of the right leg at the hip joint.

Q. And by disarticulation of the right stump, what do you mean?

A. I mean disengaging and disarticulating the ball from the socket in the hip joint.

Q. Then these procedures were all under general anesthetic? [526]

A. These were all under general anesthetic.

Q. Then the next operative procedure, Doctor? Doctor, you have given me a written report?

A. If these are chronological, that is fine.

(Another document was handed to the witness.)

The next procedure after the 28th was on the 4th of August. No, let's see here. No, I think—oh, yes, on the 4th of August, under general anesthesia, the right forearm was opened and the right radius and ulna were proximated under open operation and bone plates applied.

Q. What do you mean by "bone plates?"

A. That means bringing the fractures into ap-

(Testimony of Howard V. Valentine.)

position and holding them by means of a metal plate held in place by metal screws.

Q. And how many metal plates were put in the right forearm of Gerry Stintzi on that date?

A. Two.

Q. Would that be one on each bone in the forearm?

A. One on each bone of the right forearm.

Q. Go ahead, then, Doctor.

A. And, at the same time, redressing of the disarticulation of the right hip was carried out under anesthetic.

Q. As I understand it, Doctor, in this hip procedure, there was no skin to be applied over the open wound? [527]

A. That is correct, there was no skin over the lower third of the right abdomen. It was all destroyed in the accident. We had no flaps to use to cover the raw areas produced by amputation and disarticulation.

Q. How was bleeding stopped?

A. Bleeding was stopped by the use of pressure and, of course, ligation of all the major vessels, which were done at the first operation.

Q. That is, sewing the vessels?

A. That is tying of the vessels.

Q. Tying of the vessels. Then, later on, some grafting from skin on other parts of his body to this hip region was commenced?

A. That is correct. After the raw area overlying the disarticulation site had granulated and de-

(Testimony of Howard V. Valentine.)

veloped clean, healthy tissue sufficiently, then it was possible to carry out skin grafting.

Q. When did you start the grafting?

A. The first grafting was done on the 13th of August.

Q. And the skin you used in that graft was taken from where and placed where on his body?

A. The skin used was taken from the abdomen from the level of the chest. All the healthy areas of skin were borrowed from to find skin to cover the raw area over the disarticulation. [528]

Q. Then the healthy skin would be taken off of the abdomen and put on the hip, is that it?

A. That is correct.

Q. How much skin would you graft at one operation?

A. Well, we had a problem here because, first of all, we had an area that wasn't smooth, an area that still retained some infection, but it was a constant source of loss of serum, so we elected to do this by means of pinch skin grafts, which meant we took small pieces of skin half the size of a dime off the abdomen and placed them on the healthiest places on the stump. This had to be done in stages, first of all, because all of the stump wasn't ready for grafting at one time and, secondly, it is a procedure that requires some time and we didn't wish to subject him to too long a time under anesthesia.

Q. Were those grafting operations all under general anesthesia?

A. They were all under general anesthesia.

(Testimony of Howard V. Valentine.)

Q. And continue on after August 13th, then, Doctor.

A. On September 5th, more skin grafting was done to the stump. There was also an infected tract present in the stump area which was explored and opened to permit further treatment while in bed.

Q. September 15th? [529]

A. On September the 5th.

Q. Yes. Well, then, what date did you next have him in surgery?

A. Now, then, I believe our next operative procedure was then on October the 7th, where it developed that in the healing of the fractures of the forearm, nature had been a little over-anxious and had produced a little more callus than we ordinarily see and had bridged across between the two bones, between the two bones of the forearm, and in so doing had fixed the forearm as far as supination and pronation is concerned. The healing taking place in the fractured site was excellent, so it was elected to remove this bony bridge which had grown across between the two bones.

Q. Which to do that, you had to cut into the arm?

A. Had to open up the arm.

Q. Open up the arm?

A. The area between the two bones.

Q. That was done on October 7th?

A. October 7th.

Q. Then during this period, were you continuing with your skin grafts, Doctor?

(Testimony of Howard V. Valentine.)

A. Some more skin grafts were placed on the stump at the same date.

Q. If you will continue on, then, what you next did for the [530] patient.

A. The next operative procedure I find was not carried out until the 24th of February of '53, at which time the four pins which had been originally placed in the left thigh bone in the treatment of that fracture were removed.

Q. Are these steel pins that were placed in the left leg? A. They were.

Q. And they were taken out on February 24th?

A. February 24th.

Q. 1953? A. 1953.

Q. Then during all of this period, was Mr. Stintzi given numerous blood transfusions?

A. He had numerous blood transfusions.

Q. Do you know how many in all?

A. Pardon me?

Q. Do you know how many in all?

A. I don't have the figure. Well, I can give you roughly the figure, I can't give you the amount of each.

Q. Well, roughly how many, Doctor?

A. He was transfused on 12 occasions, on 12 different dates, on some occasions, on the first few days, receiving more than one pint, probably two or three pints, but on 12 separate occasions he was transfused. [531]

Q. Then during all of this period up to February 24th you have talked about, what was his con-

(Testimony of Howard V. Valentine.)

dition in the hospital when conscious as to pain and suffering?

A. In the early weeks of his confinement, he underwent a considerable amount of pain. After some healing had progressed in the right stump and after the bones of the right forearm and left thigh were immobilized, his pain was not great.

Q. Then, Doctor, he remained in the hospital until what date?

A. He remained in the hospital, on the occasion of his first stay, from the 17th of July of '52 until March 28, '53.

Q. And he was then released to his home?

A. He was then released to his home.

Q. And was he later returned to the hospital during the year 1953?

A. Yes, on April 25th of '53, he was taken to the hospital as an out-patient only for X-rays on the left thigh bone, femur.

Q. Then again back to the hospital when?

A. Back to the hospital again on the 24th of June of '53 for the same purpose.

Q. The next time?

A. The next admission was on August the 13th, when he was [532] admitted to the hospital again, taken to surgery the following day, and the bone plates removed from the right forearm. He was then discharged on the 17th of August on that admission.

Q. He was in five days at that time?

A. That time he was in for five days.

(Testimony of Howard V. Valentine.)

Q. And was the 17th of this last August the last time he has been confined in the hospital itself?

A. That is correct.

Q. Now has he been under your care, Doctor, ever since his release from the hospital?

A. Yes, he has been under my care.

Q. And he still is under your care?

A. He still is under my care.

Q. What has been the situation, Doctor, since his release from the hospital as to his general well being and what you have done for him and what you have advised him to do and what he has done for himself?

A. Well, of course, when he first left the hospital, he had considerable stiffness in the left knee as a result of the prolonged immobilization of the fractures and his long period of convalescence and bed rest. He was able to be about on crutches with help when he left the hospital and gradually there was a restoration of motion in the left knee. The muscles of the left leg [533] developed rapidly after he was up and about, and he continued to exercise his arms diligently and he soon regained good muscular development in his arms. There did remain a lack of complete extension of the fingers, the index and second finger, particularly, of the right hand as a result of the severity of the injuries associated with the fractures of his right forearm.

Q. Doctor, is that condition of his right hand and right forearm that we saw here Monday, I believe, a permanent fixed condition as of today?

(Testimony of Howard V. Valentine.)

A. There is a lack of improvement of the condition as I have observed it in the last few months.

Q. Would you say that the condition is fixed?

A. I feel it is probably fixed.

Q. How about the left leg as of today, the flexion and extension of his left leg?

A. The extension is 100 per cent. There is a few degrees lacking in complete flexion. The stability of the knee is excellent and the muscular development of the left thigh and calf muscles is excellent.

Mr. McKevitt: Is what?

A. I say the development of the left calf and thigh muscles is excellent.

Q. (By Mr. MacGillivray): Is there some remaining disability of that left leg? [534]

A. There is some remaining disability due to the lack of complete ability to completely flex the knee.

Q. And is that condition fixed, in your opinion?

A. I feel that it is.

Q. Doctor, did Gerry complain to you of some burning sensation when he goes to the bathroom?

A. No. He has some sensory changes about the perineum, about the inner portion of that right disarticulation stump. That is hypersensitivity to contact with anything.

Q. Is that problem a fixed condition?

A. That could be probably alleviated by some method or other.

Q. Beg your pardon?

(Testimony of Howard V. Valentine.)

A. That might be alleviated or it may spontaneously disappear.

Q. And, Doctor, what is the condition as of today of the right stump?

A. The right stump, necessarily, is an irregular stump because of the nature of the original wound. It is well healed in all respects except over a small area perhaps the size of a dime in its most appended portion, where from pressure there has developed a little excoriation of the skin, meaning that just to the *kepth* of the skin in that particular area there develops a blister or a [535] sore very easily.

Q. Doctor, does he continue to have pain and discomfort from the area of that stump?

A. I don't feel that he has any pain and discomfort except where pressure is applied to it, and that, I think, is primarily due to the small area where this blister developed, that and the hip's sensitivity, the hip's sensitivity probably due to some skin nerve or some sensory nerve close to the surface of the stump.

Q. Well, Doctor, do you know whether or not Gerry was fitted with a prosthesis or artificial leg?

A. He was.

Q. About when was that?

A. Beg pardon?

Q. About when was that, if you recall?

A. Well, that was approximately—I couldn't give you the exact date on that, but I would think that that was probably three months after his orig-

(Testimony of Howard V. Valentine.)

inal discharge from the hospital, two to three months.

Q. And has that artificial leg been changed from time to time?

A. There have been adjustments made in it, I couldn't say how many.

Q. And to your knowledge, has Gerry conscientiously tried to adapt himself and to use that artificial leg? [436]

A. He has used it, how much I am unable to say. I have tried to encourage him to use it continuously, but because of the fact that he was in school and, naturally, there is an awkwardness to an artificial limb and it takes a long time to learn to use them, especially at that level. I don't know how much of the time he has actually used it.

Q. And, Doctor, the pressure you refer to that has caused these ulcerations or sores on the stump, is that the pressure from use of the artificial leg?

A. I think it is, uh-huh.

Q. Well, Doctor, how often do you see Gerry?

A. Well, after he was discharged from the hospital, I saw him at weekly intervals for a number of months, and then every couple of weeks, and finally about once a month.

Q. And to your knowledge, Doctor, from seeing him after he got this artificial limb, has he ever been able to use it with satisfaction or comfort?

A. Well, the last time that he wore it into the office to see me, he was using it better than he had at any previous time.

(Testimony of Howard V. Valentine.)

Q. Well, you know that he had to quit wearing it sometime, Doctor?

A. I know he has quit on occasions. [537]

Q. Yes. And, Doctor, do you have any opinion as to whether or not in the future Gerry will be able to satisfactorily use and adapt himself to any artificial contrivance such as a leg?

A. I have no opinion.

Q. You have no opinion. Doctor, your statement for your services, I believe, was in the sum of some \$3,000?

A. That is correct.

Q. And that is a fair charge for all the work you have done these past two years?

A. I feel that it is.

Q. You have done an awfully good job, haven't you, Doctor, with Gerry?

A. I am not the judge on that.

Q. Doctor, have you seen these color photographs that were taken of Gerry's body a week or so ago?

A. Yes.

Q. And are they accurate representations of the condition of his body as it exists today?

A. I think they are.

Mr. Etter: These have not been admitted, your Honor, but at this time, having been identified, I will move their admission.

The Court: Have counsel seen them?

Mr. Cashatt: May we approach the bench, your Honor? [538]

The Court: Yes.

(Whereupon, the following proceedings were

(Testimony of Howard V. Valentine.)

had before the bench, in the presence, but out of the hearing of the jury:)

Mr. Etter: I was going to make a short statement to the jury that probably some of those views wouldn't be appetizing, but I'm afraid if I did, it might be objected to as a comment to the jury. I don't know that I should do that, but your Honor might state to them on the admission of the exhibits the purpose of them.

Mr. McKevitt: I don't know how far you want them to go.

Mr. Etter: I won't say anything if the Court says it. It is just a cautionary measure, making that statement to the Court.

Mr. McKevitt: I know, but counsel is seeking a ruling from the Court in advance. If you want to take a chance on it, I suggest that you do it.

Mr. Etter: We will run the pictures.

The Court: I don't see how I could very well comment on them without perhaps overemphasizing them. I think you should be permitted to make your objection in the absence of the jury, if you wish, to this whole procedure so far as showing the slides is concerned. [539]

Mr. Cashatt: Yes. And, your Honor, the defendant objects to the showing of the slides with the equipment that is now in the courtroom. I believe, for the purpose of the objection, that possibly the record should show the equipment that is being used. I would like the record to show that.

The Court: Yes, all right.

(Testimony of Howard V. Valentine.)

Mr. Etter: Correct, we will stipulate to that.

Mr. Cashatt: May I ask one more question for the stipulation? Counsel, what type of screen is that that they are being showed on?

Mr. Hagin: Standard beaded screen.

Mr. Cashatt: Made of what material, please?

Mr. Hagin: Of beads.

The Court: I think your stipulation should show, too, that the operator of the machine is the prier witness here, Mr. Wally Hagin.

Mr. Cashatt: We will so stipulate, counsel.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. Etter: Is there a ruling made, your Honor, on the exhibits which I have just offered?

The Court: Yes, they may be admitted.

Mr. Etter: 26 to 33 may be admitted.

(Whereupon, the said colored slides were admitted in evidence as Plaintiff's Exhibit 26 to 33, inclusive.)

The Clerk: I have marked 34, 35 and 36, your Honor.

Mr. MacGillivray: Your Honor, I ask the admission of Plaintiff's Exhibit No. 34, which is the hospital bill of Gerry Stintzi, showing a total hospital account of \$6,678.98, which counsel has seen.

The Court: Is that your No. 34?

Mr. MacGillivray: Yes.

The Court: Is there any objection to that?

Mr. Cashatt: No objection.

The Court: It will be admitted. [543]